No. 215

Office Supreme Court, U.S.
FILED
JUL 24 1951
JOHN T. FEY, Clerk

IN THE

United States Court of Appeals

For the Second Circuit

Case No. 24920

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

against

SAMUEL GOLDSTEIN,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF AND APPENDIX

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IN THE

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For the Second Circuit

Case No. 24920

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

against

SAMUEL GOLDSTEIN,

Defendant-Appellant.

APPELLANT'S BRIEF

Preliminary Statement

This is an appeal by the defendant Samuel Goldstein, an attorney, from the final judgment of the United States District Court, Southern District of New York (Ryan, J.) (App. 5a), in an action brought by the United States of America pursuant to 28 United States Code 1345 to enforce collection of unpaid withholding tax liens against a condemnation award in the sum of $4,350 made to the defendant taxpayer Pay-O-Matic Corp. by the New York State Supreme Court, New York County, for trade fixtures formerly owned by it. Judgment was rendered in conformance with a memorandum endorsed (App. 3a) on November 1, 1957 as the decision of the Court below on granting appellee's motion for summary judgment wherein it was adjudged that the appellee's lien for unpaid taxes is

superior to the lien and assignment of the condemnation award of appellant and denying the appellant's cross-motion for summary judgment.

Previously, a proceeding commenced in the State Court by motion on April 30, 1957 by the defendant Samuel Goldstein, and Sons, as attorneys for the defendant Pay-O-Matic Corp. in the condemnation proceeding, pursuant to Section 475 (App. 9a) of the New York State Judiciary Law to enforce their attorneys' lien against the award in the condemnation proceeding, was enjoined by order of the United States District Court, Southern District of New York (Levet, J.) made and entered on July 15, 1957.

Judgment was granted against Pay-O-Matic Corp. in the sum of $10,996.04. Appellant does not contest the liability of Pay-O-Matic Corp. for alleged tax delinquencies nor the validity of the appellee's liens.

This appeal is from the judgment, adjudging that the lien of the appellee for unpaid taxes is superior to the lien of and the assignment of the condemnation award to the attorney appellant.

The appellant was retained by Pay-O-Matic Corp. by written retainer agreement (App. 7a) as its attorney to represent it in the condemnation proceeding wherein it agreed to pay and "hereby assigns to said attorneys, for their services twenty-five (25%) percent of any award and interest that may be made for trade fixtures". Prior to the filing by appellee of its Notice of Tax Lien pursuant to 26 United States Code 6323, appellant was retained, as above shown, and had performed numerous and substantial services and incurred obligations for experts' fees and other disbursements in the condemnation proceeding which resulted in the award made to his client.

The judgment appealed from ordered the Comptroller of the City of New York to pay to appellee the entire condemnation award in disregard of appellant's lien.

Facts

The facts are not in dispute. Pay-O-Matic Corp. was delinquent in the payment of certain withholding taxes for 1954 and 1955 to the United States. On August 5, 1955 the City of New York vested title to certain of Pay-O-Matic's property in a condemnation proceeding, i.e., Washington Square Southeast Slum Clearance. On August 15, 1955 the Collector assessed Pay-O-Matic Corp. in the sum of $6,947.42. On November 15, 1955 a second and third assessment in the sum of $4,500.78 was made. On November 18, 1955 the appellant was retained as attorney in the condemnation proceeding and Pay-O-Matic Corp. provided therein (see App. 7a) that it "hereby retains Samuel Goldstein & Sons as its attorneys to represent it in the above proceeding, and agrees to pay and hereby assigns to said attorneys, for their services twenty-five (25%) per cent of any award and interest that may be made for trade fixtures contained in said property". An appraisal was ordered and made. This expert thereafter rendered his bill in the sum of $140, which is the fair and reasonable value of the services rendered. A photographer was engaged who took photographs of the property. Appellant performed all necessary services in representing his client in the condemnation proceeding. On December 12, 1955 the United States filed a notice of tax lien in the Register's office of New York County in the sum of $11,629.44. Thereafter Pay-O-Matic Corp. paid the sum of $9,856.12. In the schedule annexed to appellee's complaint it is shown that only $7,166.25 of this payment was applied to this lien. We contend in Point III of this brief that the full amount of this payment should have been applied against this lien. The unpaid portion of this lien would then be $1,773.32 and there would then remain a sufficient amount in the condemnation award to pay appellant's fee and disbursements in the sum of $1,294.32. On February 23, 1956 a fourth tax assessment of $3,254.77

was made against Pay-O-Matic Corp. Thereafter, in the condemnation proceeding, on March 30, 1956, as a result of a conference between appellant and the condemnor's attorney it was agreed to settle the claim of Pay-O-Matic Corp. for the sum of $4,350 and on April 17, 1956 a stipulation of such settlement was signed by Pay-O-Matic Corp. On June 28, 1956 an amended notice of tax lien was filed in the Register's office of New York County. On August 22, 1956 the decision of the New York State Supreme Court was published which incorporated the aforesaid stipulated settlement of the amount of the award and on September 25, 1956 that court signed the final decree.

The Court Below

The Court below held that the attorney's lien of appellant was subordinate to appellee's lien because appellant's lien was inchoate as compared to the Government's lien. The appellant as an assignee of the award under his written retainer agreement is a "purchaser" under 26 U. S. C. 6323 (discussed in Point I of this brief). The Court below based its decision on the application of the "Specific and Perfected Rule", to the case of a "purchaser".

It is contended (in Point II of this brief) that the Court below erred in the application of this rule to the case of a purchaser. For purposes of orderly presentation we cover this as the second point in this brief.

Issues

1. The attorney-appellant is a "Purchaser" within the meaning and intent of 26 United States Code 6323 and was such prior to the filing of the first notice of tax lien on December 12, 1955 by the United States Government. "Purchaser" under 26 U. S. C. 6323 is the same as "Pur-

chaser'' under numerous other statutes, mostly recording acts, where it is the term of art for the equitable doctrine of ''bona-fide purchaser for a valuable consideration''. The ''valuable consideration'' required is any consideration sufficient to support a simple contract as long as it is within the class that the law esteems as an equivalent given for the grant. And there is an equivalent given for the grant where the purchaser enters into a binding obligation under the contract from which he cannot withdraw or otherwise innocently changes his position and cannot extricate himself. Being a ''Purchaser'', the appellant's interest and lien is prior and superior to the respondent's lien.

2. The ''Specific and Perfected Rule'' does not apply to ''Purchasers''. To apply it would judicially repeal 26 U. S. C. § 6323.

3. The United States Government improperly applied the payments of the taxpayer client to the prejudice of the attorney-appellant. Correctly applied, appellant could satisfy his lien out of the condemnation award.

4. The appellee, in receiving the advantage of appellant's services has been unjustly enriched.

POINT I

The attorney-appellant is a "purchaser" within the meaning and intent of 26 United States Code 6323 and was such prior to the filing of the first notice of tax lien on December 12, 1955, by the United States Government. "Purchaser" under 26 U. S. C. 6323 is the same as "purchaser" under numerous other statutes, mostly recording acts, where it is the term of art for the equitable doctrine of "bona-fide purchaser for a valuable consideration". The "valuable consideration" required is any consideration sufficient to support a simple contract as long as it is within the class that the law esteems as an equivalent given for the grant. And there is an equivalent given for the grant where the purchaser enters into a binding obligation under the contract from which he cannot withdraw or otherwise innocently changes his position and cannot extricate himself. Being a "purchaser", the appellant's interest and lien is prior and superior to the respondent's lien.

The appellant-attorney and the appellee have two points of contention in regard to the construction of Section 6321 and Section 6323 of 26 United States Code under which the United States claims its priority of lien.** Briefly outlined these two sections provide that the date of assessment of federal taxes (here August 15, 1955 and November 15, 1955) shall be the date on which the lien for federal taxes affixes as to all those who are not "mortgagees, pledgees, purchasers or judgment creditors" before the filing in the Register's office of New York County of the Federal Notice of Tax lien.* (See also Article 10A of New York State Lien Law.) But, in the event that one is a "mortgagee, pledgee, purchaser or judgment creditor",

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* At no time until the notice is filed in the Recorder's office is it practically or legally possible for any third party to discover its existence.

** Reprinted in full, page 9a.

then the Government's tax lien affixes on the date that the notice is filed in the Register's office (here December 12, 1955). The appellant maintains that he is a "purchaser", and became so on the date he was retained, to wit: November 18, 1955, which was prior to the time the Government's lien was filed (December 12, 1955). The United States and the appellant both agree that the decisions all hold that to be a purchaser within the meaning of Section 6323 one must be 1. an innocent purchaser 2. have received title 3. and for value. Thus, we appear to agree that there was an assignment of award given the attorney in the written retainer agreement (App. 7a) dated November 18, 1955 which was given in good faith. The parties disagree as to the third requirement, *i.e.* value, and the United States adds a fourth requirement, that the "purchasers" interest must be specific and perfected.

Thus the United States has maintained that the consideration must be in money or in kind given simultaneously with the receipt of the assignment of the award to the attorney. We maintain, and the law clearly is, that any "consideration sufficient to support a simple contract" as long as it is within the class that "the law esteems as an equivalent given for the grant" is a valuable consideration. Secondly, the United States maintains that the failure of appellants assigned interest in and lien upon the condemnation award, to have a fixed dollar value deprives it of that definiteness of amount which the "specific and perfected rule" requires. Appellant maintains that the "specific and perfected rule" does not apply to "purchasers" and indeed, cannot, as interests in property that purchasers buy, do not have constant dollar values, but fluctuate with the market.

Construction of Section 6323

There have not been too many cases reported defining "purchaser" under Section 6323. Judge Jackson of the United States Supreme Court reviewed the history of Section 6323 in his concurring opinion in *U. S. v. Security Trust Company, etc.*, 340 U. S. 47, 52 (a case which did not involve the construction of the term purchaser). He stated that Congress amended and inserted into the present law the term "purchaser" in 1912 because of the decision in *U. S. v. Snyder* (1892) 149 U. S. 210 which he says (at p. 52)

> "held * * * that the lien created by that statute was a valid binding lien even against a bona fide purchaser for value without knowledge or notice of the existence of such a lien".

He refers us to the report of Congress that accompanied the amendment HR Rep. 1018 62nd Congress 2nd session to (1912).

The report he states noted critically that a "secret lien" of the government could upset the interests of an unknowing transferee in good faith and for value, and cover property all over the country where one would not discover the lien's existence.

This being so, Congress, from the act read as a whole, set up a recording act all of its own, modeling it after existing recording acts and borrowing their devices. Compare for instance the definition of the term "purchaser" under the New York Recording Statute for Real Property. Real Property Law, Section 290, Paragraph 2.

> "The term 'purchaser' includes every person to whom any estate or interest in real property is conveyed for a valuable consideration * * *".

There have been twelve decisions in the United States Supreme Court construing 26 U. S. C. 6323. (*U. S. v. Scovil*, 348 U. S. 218; *U. S. v. Acri*, 348 U. S. 211; *U. S. v. Liverpool*

& London Ins. Co., 348 U. S. 215; *U. S.* v. *City of New Britain*, 347 U. S. 81; *U. S.* v. *White Beer Brewing Co.*, 350 U. S. 1010; and *U. S.* v. *Collata*, 350 U. S. 808) and others discussed in the *Mason City* cases, page 16, *infra*. In each one of these, only one of the four types of lienors entitled to a priority have been considered. That has been the "judgment creditor". The "mortgagee", "pledgee" and "purchaser" have remained undefined by that Court except for dicta in the *Scovil* case.

> "A purchaser within the mean of Section 3672 [now Section 6323] usually means one who acquires title for a valuable consideration in the manner of vendor and vendee."

No Supreme Court decisions have further defined "purchaser".

As was stated in *R. F. Ball Construction Company* v. *Jacobs*, 140 Fed. Supp. 60 aff'd 239 Fed. 2d 384—appeal now pending in the Supreme Court in reviewing the term "purchaser" (p. 63):

> "Most of the decisions of the Supreme Court cited above and referred to by the government dealt with inchoate judgment liens and none of these cases dealt with the contract lien of a 'mortgagee', 'pledgee' or 'purchaser' • • • "

In *Marteney* v. *United States*, 245 Fed. 2d 135 the 10th Circuit Court discussed herein below, the Court cited their own language in an otherwise irrelevant decision (*Nephi Processing Plant, Inc.* v. *Western Cooperative Hatcheries*, 242 Fed. 2d 567, 570) to clarify the term purchasers as follows (p. 138):

> "The sale of personal property in the usual sense ordinarily means the passing of title and possession for money or other consideration which the buyer pays or promises to pay."

This formulation makes the following obvious.

1. "For money or other valuable consideration".

(a). That things other than money are capable of being consideration.

(b). The use of the term valuable consideration is a term of art having a fixed meaning in the law, as will soon follow.

2. "Which the buyer pays or promises to pay".

That all types of contracts of purchase, unilateral as well as bilateral, are covered. That is, the consideration necessary can be a promise as well as an act. That while still executory the promise is valuable consideration.

3. No requirement of choateness is included as necessary.

But aside from federal court clarification, state courts have long dealt with the "ordinary word purchaser".

In the classic case of *Ten Eyck v. Witbeck*, 135 N. Y. 40 Judge Maynard speaking for the New York State Court of Appeals discussed the word "purchaser" as used in the Real Property Recording Act of New York (p. 44).

> "While every legal mode of acquisition of real property, except by descent, is denominated in law a purchase, and the person who thus acquires it a purchaser, it is evident that the word is used in this statute in a much more limited sense. It is there applied only to such grants of real estate as are obtained for money, or some other valuable consideration. It denotes a buyer of property and has reference to one of the actors in a transaction of bargain and sale, which is presumably controlled by commercial considerations".

The Court states that the doctrine is used to differentiate these transactions from gifts, and goes on (p. 48):

> "'The phrase a "purchaser in good faith and for a valuable consideration" is not peculiar to the

> Recording Act but is one of frequent occurrence in the statutes, and is 'an expression which has been borrowed from the language of courts of equity and should be interpreted in the sense in which it is there understood * * *. A valuable consideration has been defined by writers upon equity jurisprudence as something which the law esteems as an equivalent given for the grant, and it is, therefore, founded on motives of justice.' "

It is clear that both the United States Congress in inserting Section 6323 into the Internal Revenue Law and the legislatures of the various states, including the State of New York, as Judge Maynard has said, *supra*, in adopting recording acts and other similar laws had reference to and borrowed the concept that grew out of equity. It is academic that the outgrowth of the equitable doctrine of purchaser for value grew out of the rule at law that a sealed instrument "imported" a consideration and a gift was thus possible of enforcement. Equity however, would not aid the promisee of a voluntary covenant, but left him to his legal remedy. See Williston on Contracts, Section 217. Equity has always been versatile and does not stick to pat formulae or hard and fast rules except in the most general way. The entire policy of the bona fide purchaser was to protect a person who innocently "got in a spot". If he was in a position where he gave nothing, or such an insufficient amount as to make his "good faith" suspect or he could legally retrieve himself from his "spot" by nonperformance of his obligation, equity would not aid him. In the last event the test would be whether the bona fide purchaser had a right of rescission for anticipatory breach of contract or not. *VanEyck* v. *Wilbeck*, *supra*, at page 49.

Varying statutes have attempted to codify this concept of "purchaser for value". The Uniform Negotiable Instruments Law, Section 25 (New York N. I. L. Section 51), entitled Valuable Consideration says:

> "Value is any consideration sufficient to support a simple contract * * * *"

and Section 191 says "Value means Valuable Consideration" (New York N. I. L. Section 2).

There is no weighing of the relative worth of the two considerations if bargained for. The question is solely whether the consideration is so disproportionate as to put a subsequent purchaser on guard. The value goes solely to the question of good faith. See *Riley* v. *Robinson*, 128 A. D. 178, 112 N. Y. Supp. 753, aff'd 202 N. Y. 53.

In *National Refining Company* v. *United States*, 160 Fed. 2d 951 the Missouri Circuit Court of Appeals held that the consideration for an assignment of a condemnation award to the plaintiff was the possibility of future extension of credit. In *Marteney* v. *United States*, 245 Fed. 2d 135 *supra*, the following occurred. An attorney represented a client in a series of matters and was due certain monies for which the client gave the attorney a note. Then the government assessed federal taxes against the client. Later the client retained this attorney in a later libel action on a 50% contingent fee. The client agreed with the attorney that the balance of the note given to the attorney (in payment for his fees for the previous action) should be endorsed by the attorney with the provision that the sum was to be collected out of the judgment in the libel action. The Federal Government then filed a notice of tax lien. The attorney pursued the libel action and received a judgment for $7,500. The issue was whether there was a valuable consideration for the first 50% of the judgment in the libel action representing fees in that matter. The Court held in that case that the restriction of collection of attorney's fees to the libel judgment (though certainly not the bargained for consideration), was such consideration as is considered "valuable consideration", such as to make the attorney a "bona fide purchaser for value", or a "purchaser" within the meaning of Section 6323.

In the case of *LaFar v. Grimes*, 86 Fed. 2d 809, the Court attempted to lay down a tighter rule than is usually found in the equitable doctrine, but which easily applies in this case. The Court said at page 812:

> "The principle upon which the doctrine of innocent purchaser for value rests like equitable principles in general, is not a hard and fast rule of narrow application, but one to be liberally and equitably applied. Under it relief is denied to a purchaser without notice who has not paid value, on the ground that his equity arises not out of his mere lack of notice, but out of injury to him, through an innocent change of position to his prejudice. It is therefore denied where the matter of the payment remains executory between purchaser and seller and there is no irrevocable change of position. It is granted where either the buyer has paid the purchase price or has entered with third persons into a binding obligation with regard to it, whether the obligation arises out of the execution of the assumption of negotiable promissory notes, or other form of undertaking, which the buyer is able to perform and from which he cannot in law withdraw."

While we maintain that the rule today is that an executory promise is "valuable consideration", some courts have held as above that in execution of the promise there would have to be a change of position such as the entry with third persons into binding obligations, etc. to constitute "valuable consideration". Our change of position was the extent of our performance of legal services prior to December 12, 1955, and we had entered into a binding obligation with Mr. Arthur Schaff to make an appraisal and Mr. Rutter to make the photographs.

Further, we were bound, * * * An attorney who undertakes the conduct of an action impliedly stipulates to carry it out to its determination, and he is not at liberty to abandon it without reasonable cause and reasonable notice. *Carter v. Carter*, 1946, 188 Misc. 156, 66 N. Y. Sup. 2d 768.

We have found no cases where it was held that an attorney could withdraw from a case because his client was delinquent in his income taxes, or because notice of such fact was filed in the Register's office or similar reasons. The attorney in this case was bound to continue his services. He bound himself at the outset of the proceeding which was prior to the filing of the Government's tax lien. Not only did he bind himself but he extended credit to the client by retaining the services of an expert and of hiring a photographer and then performed services prior to the time when he is deemed to have received constructive notice of the Government's tax lien under Section 6323. Thus, in the following cases the attorney was permitted to collect his fee. *Filipowicz* v. *Rothensies*, 43 Fed. Supp. 619; *Herlihy* v. *Phoenix Assurance Company, Ltd., et al.*, 274 App. Div. 342, 83 N. Y. Supp. 2d 707; *Lavenburg* v. *Universal Sportswear*, 198 Misc. 318, 98 N. Y. Supp. 2d 160; *Matter of Meltzer* (*Carlin Homes, Inc.*), Volume 138, No. 34, N. Y. Law Journal, page 4, Nassau County Supreme Court. See dicta affirming *Herlihy* case, *Morgan* v. *United States*, 131 Fed. Supp. 783.

In re Astoria Blvd., 171 Misc. 1018, 13 N. Y. Supp. 2d 433, was a New York State Supreme Court case in which the Court, as a clear matter of dicta, stated that an attorney is not a "purchaser" within the meaning of Section 6323. No reasons were given, nor any authority cited. But the Court did find, and thus award the attorney his fee by holding that an assignee is a "purchaser". It is well to point out that "the Herlihy case" mentioned above states at page 711 that all attorney's liens work "an equitable assignment of the funds produced by his efforts".

The United States insists on assimilating the term "purchaser" in Section 6323 to the term "sale" as used in the Sales Act (N. Y. Pers. Prop. Law § 82). It has cited cases under that Act where a contract for labor and services were differentiated from a "sale".

It is as true that the Sales Act in the Personal Property Law of New York does not govern sales of real property as it is that it doesn't govern contracts for labor and services. So a contract for the services and labor that go into the manufacture of an article is not a contract for the sale of the article. But—it would be absurd to suggest that even under the Sales Act that when an item is purchased it cannot be paid for by the performance of services and labor. *Smith* v. *Brandenburg Instrument Co., Inc.*, 50 N. Y. Supp. 2d 264. It has been held that a sale means the transfer of any property for any valuable consideration sufficient to support a contract. *Garfield Real Estate Co.* v. *Dennis*, 167 N. Y. Supp. 43. The traditional division of the field of law called "Sales" deals with juridical acts that have separate legal machinery for dealing with them than has the law dealing with contracts for labor and services. Such a distinction is irrelevant for our purposes.

The United States has also maintained that because Sections 474 and 475 of the New York State Judiciary Law give the client a right to discharge an attorney at any time and without cause, leaving the attorney only to his remedy in *quantum meruit* that the consideration which the attorney gives to the client is not adequate within the meaning of the term "bona fide purchaser for value" or "purchaser" under Section 6323. This, however, is not a condition precedent to the attorney's assignment, but a condition subsequent, at best. When the United States Supreme Court dealt with the term Judgment Creditor (also in Section 6323) it defined the degree of perfection of a lien that would be necessary to come within that section and it referred only to conditions precedent. It could hardly be maintained that all conditions subsequent be removed from consideration as then only would money in the promisor's pocket bar such happening.

It should be here addended that the outlays made by the attorney, the disbursements, are covered by the attorney's lien. See *Spence* v. *Bode*, 108 N. Y. Supp. 593; and *Hampton, et al.* v. *Rosenheim*, 155 N. Y. Supp. 361 at page 362.

POINT II

The "specific and perfected rule" does not apply to "purchasers". To apply it would judicially repeal § 6323.

In *United States* v. *City of New Britain, Conn.*, 74 S. Ct. 368, 347 U. S. 81, the City of New Britain claimed to be a judgment creditor for unpaid city taxes. The Court holding that the city's lien had to be perfected and specific, laid down the following criterion for each (p. 84):

PERFECTED—

> "The liens may also be perfected in the sense that there is nothing more to be done to have a choate lien—when the identity of the lienor, the property subject to the lien and the amount of the lien are established."

SPECIFIC—meaning that the lien has attached to a specific piece of property.

In *R. F. Ball Construction Company* v. *Jacobs*, 140 F. Supp. 60, aff'd 239 Fed. 2d 384, certiorari granted in the United States Supreme Court, the District Court disregarded the 12 cases decided by the Supreme Court of the United States because they all construed only the term "judgment creditor" in 26 U. S. C. 6323. It put the remaining "mortgagee", "pledgee" and "purchaser" in a different category, holding they did not have to be specific nor perfected. It called these "contract liens" and the former "statutory liens".

This distinction was fully discussed and adhered to in *Mason City and Clear Lake R. Co.* v. *Imperial Seed Co.*, 152 F. Supp. 145; 155.

> "Intimations have been made and the fear has been expressed that the United States Supreme Court might apply the 'specific and perfected' rule

> now being applied to statutory liens to consensual or contractual liens such as mortgages * * * [and at page 156]. To hold that Government claims for taxes could attain priority under the 'specific and perfected rule' over a valid real estate mortgage even though the tax debt arose subsequent in time to the creation of the mortgage would seem to have catastrophic consequences for fiduciaries, banks, pension funds and other investors investing funds in first mortgage loans."

SPECIFIC—If it were held that the award here was inspecific at any time, the Government's lien attached to the same inspecific property and thus suffered the same defect. However, the award was specific from the outset.

There is no contingency in condemnation. Property described by the taker is divested from its former owner and just compensation must be paid with or without any action by the former owner. Under the procedure used in the instant case a Judge of the State Court divested Pay-O-Matic of its title by an order issued in an *in-rem* proceeding, and having the duty to award just compensation set the matter down for a hearing, after payment of just compensation was absolutely assured (8/5/55). Former owners not appearing, the Judge was bound to award just compensation and hold an inquest for that purpose. At any rate, Federal law (14th Amend.) conceives and indeed requires the award to have been specific from the vesting date (8/5/55). So specific as to require interest to be paid on it from that date.

> *Kennedy* v. *Indianapolis*, 103 U. S. 599, 26 L. Ed. 550;
>
> *Cherokee Nation* v. *Kansas Railway Co.*, 135 U. S. 641, at 659, 341 L. Ed. 295, 10 Sup. Ct. 965.

PERFECTED—On November 18, 1955 Samuel Goldstein & Sons were retained and pursuant to their retainer agreement were assigned twenty-five per cent of the award owned to Pay-O-Matic Corp. They were given a one-quarter interest in the award or a tenancy in common in the award (see p. 7a, *infra*).

There was an effective transference of interest in the award, complete against all.

The United States maintains that not until the Final Decree in the condemnation proceeding was signed was the defendant attorney's services complete and thus "perfected". It applies the rule applicable to "judgment creditors" to "purchasers". A "judgment" is defined as:

> "The final determination of a court of competent jurisdiction of the rights of a party in an action or proceeding" (Black's Law Dictionary, 3d Ed.).

While a "judgment" must by its nature liquidate the damages to be "final" and thus be a "judgment" be perfected, and choate, this does not follow for a "purchase". A "Purchase" cannot by its nature be liquid as to its value. A "purchaser denotes a buyer of property" (see *Ten Eyck* v. *Witbeck*, 135 N. Y. 40) and the transfer of an interest in property. While there is a consideration given for the transfer, that does not necessarily establish or fix the value of the purchaser's interest. Value is established by "market", and "market" fluctuates, is never constant and is subjective. Thus "purchaser" would not have a fixed dollar translation for his interest.

As was suggested in the *R. F. Ball* and *Mason City* cases, to add such a requirement as the specific and perfected rule to the "purchaser" category would be to judicially repeal Section 6323.

POINT III

The United States Government improperly applied the payments of the taxpayer client to the prejudice of the attorney-defendant. Correctly applied appellant could satisfy his lien out of the condemnation award.

The information supplied by the Government in the chart accompanying the complaint and the notices of tax lien filed in the Register's office indicates that the Government in receiving monies after the assessment was made by the collector and after a demand for payment and after such threat of legal action received certain monies from said taxpayer. Instead of applying these monies in the order in which the delinquencies were due, the United States left an unpaid amount of the monies demanded under the first lien roughly equivalent to the size of the award in the condemnation proceeding and applied the remainder to later and junior liens under which they would have no priority over the appellant's lien. Section 6323 of 26 U. S. Code and other statutes, gives to the Government, as we have seen, certain extraordinary powers and privileges in relation to other liens and in enforcement of its liens. As a matter of common sense, equity and justice the United States should be bound to deal fairly with other lienors. It is not in the position of an ordinary creditor. It is bestowed with certain rights that only Courts of law can exercise with other creditors. Thus in the case of *Commercial Credit Corporation* v. *Schwartz*, 130 Fed. Supp. 524 where a similar situation arose and the Government applied sums received at a distress sale to later and junior liens to the prejudice of lienors with superior liens, the Court said (p. 530):

> "The effect of giving recognition in the instant proceeding to the allocation made by the government of the proceeds of the sale of the personal property

would be to permit the government to satisfy out of such proceeds two junior liens while preserving its senior lien for enforcement against the fund which stands in the place of the real estate and with respect to which the right of the plaintiffs are inferior. The injustice of such a result is manifest to our eyes."

This issue becomes important because the services of the appellant was completed on March 30, 1956, when the amount of the claim was adjusted with the City of New York. See *In re City of New York (Mill Brook Houses)* 146 N. Y. S. 2d 520, 1 App. Div. 667 aff'd w o opinion Court of Appeals 161 N. Y. S. 2d 130. It was not until June 28, 1956, that the second notice of lien was filed by the Federal Government in the Register's office. If payment were applied as we maintain it should be, the Government's first lien is small enough to allow payment of both the attorney's and the Government's liens out of the condemnation award.

POINT IV

The appellee in receiving the advantage of the defendant-attorney's services has been unjustly enriched.

There are a few cases where the facts are on all fours with the facts in this matter. Among these are the *Herlihy* case *supra*, the *Lavenburg* case *supra*, the *Filipowicz* case *supra*, the *Meltzer* case *supra* and some others. These cases do not directly discuss the provisions of the Internal Revenue Code, namely Section 6321 and Section 6323. The Courts in each of these cases in holding that the attorney's lien was superior to the federal lien appeared to be relying on general quasi contractural theories or on some estoppel basis.

In the case of *Filipowicz* v. *Rothensies*, 43 Fed. Supp. 619, the Court at page 624 said:

> "I base my ruling that the attorney's fee should be paid out of the fund involved in this proceeding upon the well recognized principle that an attorney has a lien on a fund which has been created as a result of his efforts in litigation."

then citing *Harris' Appeal* (*Jacoby's Appeal*) 323 Pa. 124, 125, 186 A. 92, he quoted:

> "If a principle in law or equity can be found to sustain an award, of reasonable counsel fee and costs to the owner's attorney who litigated the compensation dispute and whose services helped produce the fund it ought to be applied."

The facts of that case are these. There was a bankruptcy. United was a creditor of the bankrupt. Then an assessment was made by the United States against United. United retained an attorney and the attorney went ahead and filed a claim in the bankruptcy. The Government then filed its tax lien in the proper place for recording. It was a good time later before the attorney was able to produce a fund. The Court there held that the attorney was entitled to be paid his fees and made the foregoing statement in that connection. In the *Herlihy* case the New York State Appellate Division 3rd Department based its giving of a priority to the attorney's lien because the attorney produced the fund. This case has been widely cited approvingly.

In an article written by Leonard Sarno, a Special Assistant to the Attorney General in the tax court, entitled "Correlation of Priority and Lien Rights" appearing in 95 University of Pennsylvania Law Review, page 761 (which was cited by Justice Minton of the United States Supreme Court in the *United States* v. *The City of New Britain*, *supra*), stated:

> "The problem of attorney's fees and interest is somewhat different. * * * Since the United States if it foreclosed would have to pay the expenses of foreclosure and give the principal to the mortgagee, it

seems only right to allow such expenses to take precedence when paid for by the mortgagee. This is somewhat similar to the collector selling goods and paying the costs of the sale before collecting the tax."

The idea behind these cases as stated from a practical viewpoint by Mr. Sarno is this. If the United States had foreclosed its tax lien, at the outset of the condemnation proceeding, and then asserted its interest in the condemnation proceeding, the Government would have had to pay for attorney's services. Why, therefore, should they object now, after having received the benefit of the attorney's services. The United States received a benefit and would be liable in quasi contract.*

* There have been several thorough law-review articles published recently which review the entire construction of the statute and the practical consequences to purchasers of property and their attorneys. See 29 Rocky Mountain Law Review 167 (Feb. 1957) and 63 Yale Law Journal 905 (May 1954).

CONCLUSION

The appellant is a "purchaser" under 26 U. S. C. 6323 by virtue of the prior assignment of award to him and his attorney's lien, and having created the fund, he is entitled to priority in satisfaction of it over the appellee's lien. The decision of the Court below should be reversed and judgment granted the appellant directing the Comptroller of the City of New York to pay to the appellant its assigned portion of the condemnation award to Pay-O-Matic Corp., in satisfaction of its lien, in the sum of $1,294.32.

Respectfully submitted,

SAMUEL GOLDSTEIN & SONS,
Attorneys for Samuel Goldstein.

ARTHUR D. GOLDSTEIN,
Of Counsel.

APPENDIX

For the Second Circuit

Civ. 121-172

—o—

UNITED STATES OF AMERICA,

vs.

PAY-O-MATIC CORP., SAMUEL GOLDSTEIN, THE CITY OF NEW YORK, and R. L. POLK & CO., INC.

—o—

Docket Entries

Date	Proceedings
1957	
June 6	Filed complaint and issued summons.
June 11	Filed affdvt & show cause order—Enjoin City NY from paying out, etc.—ret. 6-13-57. (Payment stayed pending determination).
June 11	Filed affdvt & show cause order—Dismiss, etc.—ret. 6-13-57.
June 12	Filed summons & return—served defts Goldstein, City of NY & R. L. Polk & Co. 6-10-57.
July 1	Filed memorandum opinion #23627. Defts. Goldsteins motion to strike pps. 3 and 4 etc.—denied. Pltffs. motion for temp. injunction granted. Settle order on notice. Levet, J.
July 1	Filed affdvt. of Rose Lyman.
July 16	Filed order granting pltf. motion, denying defts. cross motion and enjoining City of N. Y. and defts. etc. see order. Levet, J. Mailed notice of entry, 7-17-57.

Docket Entries

Date	Proceedings
1957	
July 18	Filed additional summons and return, served Max Wittenberg, of Pay-O-Matic Corp, 7-15-57. EDNY.
July 26	Filed answer and cross claim of deft. Samuel Goldstein.
Sept. 16	Filed Reply of pltff.
Sept. 18	Filed Affdvt & Notice of motion for summary judgment. Ret. 10-8-57.
Oct. 2	Filed affdvt. & Notice of Cross-Motion for Summary Judgment. Ret. 10-10-57.
Nov. 1	Memo End. on Cross-Motion filed 10-2-57: Motion denied. See endorsement on Government's companion motion, Ryan, J. Mailed notice of entry 11-4-57.
Nov. 1	Memo End. on pltff's motion filed 9-18-57: Granted (see memo). Submit judgment accordingly as indicated. Ryan, J.
Nov. 15	Filed Summary judgment #61,876 in favor of Pltff in the sum of $10,996.04. Ryan, J. Mailed notice of entry 11-18-57.
Nov. 29	Filed Notice of Appeal—Mailed copies to Pay-O-Matic Corp. R. L. Polk & Co. Inc., City of New York (Peter Campbell Brown) and Samuel Goldstein 1-29-57 & US Atty.
Dec. 3	Filed notice of certification of record to USCA.

Opinion of Ryan, J.

(Record, page 48)

Plaintiff United States of America and defendant Samuel Goldstein have moved respectively for summary judgment under Rule 56.

Suit was filed to enforce collection of unpaid Government withholding tax liens against a fund of $4350, held by the Comptroller of the City of New York arising from a condemnation award for trade fixtures formerly owned by the defaulting taxpayer Pay O-Matic Corp. All the defendants have failed to appear or answer, save defendant Goldstein, an attorney who alleges a lien and claim to $1294.32 of the fund for professional services rendered by him in securing the condemnation award.

It is undisputed that there is no genuine factual issue. The question presented is whether the Government lien is prior and superior to the lien of the defendant Goldstein. We hold that it is.

Chronologically we find the following facts not in dispute—

1. On August 5, 1955 The City of New York became vested with title to certain trade fixtures of Pay O-Matic Corp. as part of a condemnation proceeding the City had commenced to which the Government was not a party.

2. On November 18, 1955, Goldstein was retained by written retainer to represent Pay-O-Matic Corp. in the condemnation suit and the retainer provided that it "agrees to pay and hereby assigns to said attorney twenty-five (25%) percent of any award and interest that may be made for trade fixtures contained in said property." A notice of lien for professional services was filed by Goldstein with the Comptroller of the City of New York on November 22, 1955.

3. On December 6, 1955 a notice of levy covering withholding taxes amounting to $16,046.17 for the last quarter of 1954, and the first, second and third quarters of 1955 was served upon Pay-O-Matic.

4. On December 12, 1955 a notice of Federal Tax Lien was filed in the Register's Office of New York County for $11,629.44 covering the last quarter of 1954 and the first and second quarters of 1955.

5. On April 5, 1956 a Notice of Levy was filed with the Comptroller of the City of New York for $5,262.64 due for withholding taxes for all of 1955 from Pay-O-Matic to attach to any funds due Pay-O-Matic for the property taken by the City.

6. On June 27, 1956 an amended notice of Federal Tax lien was filed in the Register's Office and with the Comptroller for $11,882.43 for withholding taxes for all of 1955 and for unemployment taxes due for 1955 from taxpayer.

7. On August 22, 1956 a final decree was entered in the Supreme Court of the State of New York, County of New York in the condemnation proceeding awarding Pay-O-Matic a total of $4,569.28 as compensation for the property taken by the City.

8. Samuel Goldstein, the defendant, appeared for Pay-O-Matic as attorney and the amount of the lien for which he now seeks payment is fair and reasonable in amount.

Under Section 475 of the N. Y. Judiciary Law an attorney's lien is more than mere security; it is enforceable by remedy in the nature of foreclosure and may not be extinguished by action of the parties. Here Goldstein's lien arose at the commencement of the suit in condemnation and attached to the award finally made. *Reisman* v. *Independence Realty Corp.*, 89 N. Y. S. 2d 763, affd. 277 A. D. 1020; *In re Cross Island Pkway, Nassau Co.* 14 N. Y. S. 2d 238.

However, "the relative priority of the lien of the United States for unpaid taxes is, as we said in *United States* v. *Waddill Co.* 323 U. S. 353, 356, 357; * * * always a federal question to be determined finally by the federal courts. The state's characterization of its liens, while good for all state purposes, does not necessarily bind this Court." *United States* v. *Acri*, 348 U. S. 211, 213. Whether attorney Goldstein's lien by state tests would be held to be choate, it is clear that under federal tests it is as compared to that of the Government inchoate. It was not established, for the amount of the lien was contingent on the outcome of a trial in the state condemnation court to fix the amount of the award to be made to Pay-O-Matic for the property condemned. It was but a "caveat of a more perfect lien to come" (*United States* v. *Scovil*, 348 U. S. 218, 220), and is therefore subordinate to the federal tax lien; *United States* v. *City of New Britain*, 347 U. S. 81, 84.

Motion of the Government granted; defendant's motion denied; submit judgment accordingly but without costs against the defendant.

11/1/57.

SYLVESTER J. RYAN
U. S. D. J.

Judgment

(Record, pages 64-68)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

—o—

UNITED STATES OF AMERICA,

Plaintiff,

—v.—

PAY-O-MATIC CORP., SAMUEL GOLDSTEIN, THE CITY OF NEW YORK, and R. L. POLK & CO., INC.,

Defendants.

—o—

The plaintiff having moved for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, granting the relief requested in its complaint and dismissing the cross-claim of the defendant Samuel Goldstein, and defendant Samuel Goldstein having cross-moved for summary judgment granting the defendant Samuel Goldstein & Sons the relief prayed for in the cross-claim and dismissing the plaintiff's motion for summary judgment and dismissing the complaint of the plaintiff, and said motions having come on to be heard before me on the 10th day of October, 1957, and

After hearing Paul W. Wiliams, United States Attorney for the Southern District of New York (by Nicholas Tsoucalas, Assistant United States Attorney, of Counsel) in support of the plaintiff's motion and in opposition to the cross-motion, and Samuel Goldstein, Esq. in opposition to the plaintiff's motion and for the cross-motion, and there having been no other appearances, and due deliberation having been had,

Judgment

Now, on motion of Paul W. Williams, United States Attorney for the Southern District of New York, attorney for the plaintiff, it is

ORDERED that the plaintiff's motion be granted and the defendant Samuel Goldstein's cross-motion be denied; and it is further

ORDERED, ADJUDGED AND DECREED that the United States of America have judgment against defendant Pay-O-Matic Corp. for the sum of $9,669.03, and interest from June 27, 1956 in the amount of $1,327.01, amounting in all to $10,996.04; and it is further

ORDERED, ADJUDGED AND DECREED that the United States of America has a valid lien in the amount of $9,669.03 with interest from June 27, 1956, on the award granted to defendant Pay-O-Matic Corp., and now in the hands of the Comptroller of the City of New York, and it is further

ORDERED, ADJUDGED AND DECREED that the lien of the United States for federal taxes is prior and superior to all other liens on said award, and it is further

ORDERED, ADJUDGED AND DECREED that the Comptroller of the City of New York turn over the award made to defendant Pay-O-Matic Corp., amounting to $4,569.28, to the United States of America in partial satisfaction of its lien and that the Comptroller of the City of New York disregard the attorney's liens of the defendant, Samuel Goldstein, and the lien of the defendant, City of New York for sales and business taxes which have heretofore been filed with the Comptroller of the City of New York.

Dated: New York, New York.
November 8, 1957.

SYLVESTER J. RYAN,
U. S. D. J.

Exhibit II, Annexed to Cross-Motion of Appellant for Summary Judgment

(Record, page 56)

2108—A, B, C

Law Offices
SAMUEL GOLDSTEIN
217 Broadway
New York 7, N. Y.
REctor 2-5434

Samuel Goldstein
M. Robert Goldstein

Matter of The City of New York
Re: Washington Square Southeast Slum Clearance Project
Premises: 132 Bleecker Street
Borough of Manhattan, City of New York

Dated: November 18th, 1955

File 2108-B—Bryant Lighting Corp.
File 2108-C—Afco Industries, Inc.
File 2108-A—Pay-O-Matic Corporation hereby retains Samuel Goldstein & Sons as its attorneys to represent it in the above proceeding, and agrees to pay and hereby assigns to said attorneys, for their services twenty-five (25%) per cent of any award and interest that may be made for trade fixtures contained in said property.

Said attorneys' compensation is to be paid when the award is paid by the City.

Pay-O-Matic Corporation
By (Name illegible)

Block 524
Lot 13
DP 10

Received 11/21/55
(SJRJ)

Applicable Statutes

Title 26, United States Code, Section 6321

§ 6321. *Lien for taxes.*

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person. (Aug. 16, 1954, 9:45 a.m., E.D.T., ch. 736, 68A Stat. 779.)

Title 26, United States Code, Section 6322

§ 6322. *Period of lien.*

Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time. (Aug. 16, 1954, 9:45 a.m., E.D.T., ch. 736, 68A Stat. 779.)

Title 26, United States Code, Section 6323

6323. *Validity against mortgagees, pledgees, purchasers and judgment creditors.*

(a) *Invalidity of lien without notice.*

Except as otherwise provided in subsection (c), the lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate—

(1) *Under State or Territorial laws.*

In the office designated by the law of the State or Territory in which the property subject to the lien is situated.

whenever the State or Territory has by law designated an office within the State or Territory for the filing of such notice; * * *.

SECTION 475 OF THE JUDICIARY LAW OF THE STATE OF NEW YORK

475. *Attorney's lien in action, special or other proceeding.*

From the commencement of an action, special or other proceeding in any court or before any state, municipal or federal department, except a department of labor, or the service of an answer containing counterclaim, the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report, determination, decision, judgment or final order in his client's favor, and the proceeds thereof in whatever hands they may come; and the lien cannot be affected by any settlement between the parties before or after judgment, final order or determination. The court upon the petition of the client or attorney may determine and enforce the lien. As amended L. 1936, c. 876; L. 1938, c. 34; L. 1946, c. 105, eff. Sept. 1, 1946.

Office Supreme Court, U.S.
FILED
JUL 24 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957

No. 215

UNITED STATES OF AMERICA,

Respondent-Appellee,

v.

SAMUEL GOLDSTEIN,

Petitioner-Appellant.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

ARTHUR D. GOLDSTEIN,
Attorney for Petitioner,
Samuel Goldstein,
217 Broadway,
New York, N. Y.

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IN THE

Supreme Court of the United States

October Term, 1957

No.

UNITED STATES OF AMERICA,
Respondent-Appellee,

v.

SAMUEL GOLDSTEIN,
Petitioner-Appellant.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

PETITION

Samuel Goldstein prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit made and entered April 28th, 1958 affirming the judgment of the United States District Court for the Southern District of New York.

The District Court on motion of the United States for Summary Judgment and on cross-motion of Petitioner for Summary Judgment rendered Judgment for the United States.

Opinions Below

The opinion of the Court of Appeals is reported at 58-1 U. S. T. C. Par. 9478-CCH and Par. 58-654 FTS PH. The opinion of the District Court for the Southern District

of New York is reported at 58-1 U. S. T. C. 9327-CCH. They have not been reported elsewhere.

An earlier opinion of the District Court (Levet *J.*) occasioned by the motion of Petitioner to dismiss for lack of jurisdiction of the subject matter is reported in 152 F. Supp. 791.

Jurisdiction

The judgment of the Court of Appeals was dated and entered on April 28th, 1958. Jurisdiction of this Court is asserted under 28 United States Code Sec. 1254(1).

Statement of Questions Involved

1.A Can the prior decisions of this Court [1] dealing with United States tax liens [2] which were considered controlling in the court below, be reconciled with the principles of the doctrine of *Erie R.R.* v. *Tompkins* [3] in respect to the creation of a separate federal general common substantive law of property.

1.B Will the doctrine of *Erie R.R.* v. *Tompkins* [4] be applied in determining that petitioner, the holder of a specific and choate attorneys charging lien under state law has the same property rights and status in respect to a state condemnation award, he produced, when in competition with a lien of the United States Government as he would, with a like lien, not owned by the United States, under state law of property.

---

[1] *United States* v. *Waddill*, 323 U. S. 353 (1945); *United States* v. *Acri*, 348 U. S. 211 (1955); *United States* v. *Security Trust & Savings Bank*, 340 U. S. 47 (1950).

[2] 26 U. S. C. § 6321, § 6322 and § 6323.

[3] 304 U. S. 64 (1938).

[4] 304 U. S. 64 (1938).

2. Must a "purchaser's" interests be measurable in dollars to be "choate", and must a "purchaser's" interest be "choate" at all?

3. Where no case in this Court before has dealt with a "purchaser", in construing same, shall the substantive law of the state be referred to, or shall the well defined and settled meaning in the jurisprudence of our country be accorded to it in accordance with probable legislative intention or will a different meaning be given.

4. May the United States allocate payments to junior liens and preserve its senior lien for enforcement with respect to which a competing lien might be inferior?

5. Shall the United States which would have had to pay for attorney's services, to realize on a taxpayers claim, be allowed to emerge from behind its secret lien, after an attorney has expended his time, money and efforts and claim the entire award, to the exclusion of the attorney, even for his expenses, where the United States knew or should have known that an attorney's services would be necessary to produce the proceeds.[5]

6. May the United States under all the facts and circumstances in this case and after agreement by one of its agents to permit the attorney to collect his fee then stand by till the attorney has completed his work and exclude the attorney's receipt of his fee and disbursements?

7. Is it violative of the due process provisions of the 5th and 14th Amendments of the United States Constitution to give priority to a lien of the United States over that of a third party when existence of the lien of the United States is unknown and unknowable to third parties.

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[5] 26 U. S. C. 6323.

Statutes Involved

TITLE 26, UNITED STATES CODE, SECTION 6321

Page 1070, Supplement III

§ 6321. *Lien for taxes.*

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person. (Aug. 16, 1954, 9:45 a.m., E.D.T., ch. 736, 68A Stat. 779.)

TITLE 26, UNITED STATES CODE, SECTION 6322

Page 1070, Supplement III

§ 6322. *Period of lien.*

Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time. (Aug. 16, 1954, 9:45 a.m., E.D.T., ch. 736, 68A Stat. 779).

TITLE 26, UNITED STATES CODE, SECTION 6323

Pages 1070-1, Supplement III

§ 6323. *Validity against mortgagees, pledgees, purchasers, and judgment creditors.*

(a) *Invalidity of lien without notice.*

Except as otherwise provided in subsection (c), the lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate—

(1) *Under State or Territorial laws.*

In the office designated by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law designated an office within the State or Territory for the filing of such notice; * * *.

SECTION 475 OF THE JUDICIARY LAW OF THE STATE OF NEW YORK

Page 422 of McKinneys Consolidated Laws of New York Annotated

§ 475. *Attorney's lien in action, special or other proceeding.*

From the commencement of an action, special or other proceeding in any court or before any state, municipal or federal department, except a department of labor, or the service of an answer containing counterclaim, the attorney who appears for a party has a lien upon his client's cause of action, claim, or counterclaim, which attaches to a verdict, report, determination, decision, judgment or final order in his client's favor, and the proceeds thereof in whatever hands they may come; and the lien cannot be affected by any settlement between the parties before or after judgment, final order or determination. The court upon the petition of the client or attorney may determine and enforce the lien. As amended L. 1936, c. 876; L. 1938, c. 34; L. 1946, c. 105, eff. Sept. 1, 1946.

Facts

The facts are not in dispute. Pay-O-Matic Corp. was delinquent in the payment of certain withholding taxes for 1954 and 1955 to the United States. On August 5, 1955 the City of New York vested title to certain of Pay-O-Matic's property in a condemnation proceeding, i.e. Washington Square Southeast Slum Clearance. On August 15, 1955 the Collector of Internal Revenue assessed Pay-O-Matic Corp. in the sum of $6,947.42. On November 15, 1955 a second and third assessment in the sum of $4,500.78 was made. All assessments were not only not known to Petitioner or

the Public, but not knowable as well. On November 18, 1955 the petitioner was retained as attorney in the condemnation proceeding and Pay-O-Matic Corp. provided therein (7A) that it "hereby retains Samuel Goldstein & Sons as its attorneys to represent it in the above proceeding, and agrees to pay and hereby assigns to said attorneys for their services twenty-five (25%) percent of any award and interest that may be made for trade fixtures contained in said property". An appraisal was ordered and made pursuant to Petitioner's request by an appraisal expert who thereafter rendered his bill in the sum of $140.00 which is a fair and reasonable value of the services rendered. A photographer was engaged who took photographs of the property. Petitioner performed all necessary services in representing his client in the condemnation proceeding. On December 12, 1955 the United States filed a notice of tax lien in the Register's office of New York County in the sum of $11,629.44. Thereafter Pay-O-Matic Corp. paid the sum of $9,856.12. In the schedule annexed to respondent's complaint it is shown that only $7,166.25 of this payment was applied to this lien. The unpaid portion of this lien would then be $1,773.32 and there would then remain a sufficient amount in the condemnation award to pay petitioner's fee and disbursements in the sum of $1,294.32. On February 23, 1956 a fourth tax assessment of $3,254.77 was made against Pay-O-Matic Corp. During the early Spring of 1956 Mr. Guzzetti, Collection Officer of the Bureau of Internal Revenue, called and spoke to Samuel Goldstein, Esq., stating that the federal government had a tax lien against his client-taxpayer Pay-O-Matic Corp.; that the government would in all events allow the attorney to collect his fee and asked to be advised when the award would be ready for collection. Thereafter in the condemnation proceeding, on March 30, 1956, as a result of a conference between petitioner and the condemnor's attorney it was agreed to settle the claim of Pay-O-Matic Corp. for the sum of $4,350 and on April 17, 1956 a stipulation of such

settlement was signed by Pay-O-Matic Corp. On June 28, 1956 an amended notice of tax lien was filed in the Register's office of New York County. On August 22, 1956 the decision of the New York State Supreme Court was published which incorporated the aforesaid stipulated settlement of the amount of the award and on September 25, 1956 that court signed the final decree.

Basis for Federal Jurisdiction in the Court of First Instance

The United States instituted this action in the District Court for the Southern District of New York pursuant to 28 United States Code 1345, to enforce collection of unpaid withholding tax liens and to enjoin proceedings brought by Petitioner in the New York State Supreme Court to enforce his attorney's lien, under § 475 of the New York State Judiciary Law.

Petitioner appeared in the District Court and objected to the jurisdiction of that Court over the subject matter herein and moved to dismiss. Levet, *J.* denied Petitioner's motion. (See 152 Fed. Supp. 791.)

Reasons Relied on for the Allowance of the Writ

The reasons relied on for the allowance of the writ of certiorari by this Court are:

A. The Court of Appeals and District Courts decisions are in conflict with applicable decisions of the New York State Courts, and disregard the settled state substantive law of property relying on a federal general law. The decision of the Court below is in square conflict with the holding of the Courts of the State of New York in:

1. *Herlihy v. Phoenix Assurance Company Ltd., et al.*, 274 App. Div. 342, 83 N. Y. Supp. 2d 707.

2. *Lavenburg* v. *Universal Sportswear*, 198 Misc. 318, 98 N. Y. Supp. 2d 160.
3. *Matter of Meltzer* v. *Ceglia (Carly Homes, Inc.)* 9 Misc. 2d 464.
4. *United States* v. *Koblentz*, 4 N. Y. App. Div. 2d 869 (case 10), lv. to app. gr. 4 N. Y. App. Div. 2d 947 (case 23).
5. *Matter of Peters*, 271 App. Div. 518.

Innocent parties relying upon the established substantive rules of property, have been called on to pay the delinquent taxes of others.

See 29 Rocky Mountain Law Review, page 167.

B. The questions here involve important and basic questions:

1. In the interpretation of the federal tax lien law which has not been settled by this court before.

2. Involving the unsettling effect of misinterpreted previous decisions of this court on long settled property rights.

3. In the administration of the tax laws and the intended fair and in the long range, most effective and productive method thereof.

4. On the effectiveness of any guarantee of a right to counsel where a client is even prior to any determination of his tax liability, deprived of an ability to pay Counsel for his services.

5. Involving the relation of the state and federal governments in the making of substantive laws of property.

6. On the right of an attorney who has produceed a fund for a taxpayer-client and enabled the United States

thereby to collect its taxes to be paid his fees and expenses out of the recovery.

C. Some of the questions, here on first impression, involve an area of law of nationwide concern that has recently caused a yet ever growing flood of federal litigation, now the second largest case load handled by the Department of Justice (after refund suits).[6]

I.

STATE OR FEDERAL SUBSTANTIVE LAW OF PROPERTY

The rule laid down by this Court in *United States* v. *Waddill*, 323 U. S. 353; *United States* v. *Security Trust and Savings Bank*, 340 U. S. 47, and *United States* v. *Acri*, 348 U. S. 211, 213, that "the relative priority of the lien of the United States for unpaid taxes is, * * * always a federal question to be determined finally by the federal courts" and that "the state's characterization of its liens, while good for all state purposes does not necessarily bind this Court", and quoted and cited in the District Court's decision herein and the decision in *U. S.* v. *Bess*, ——U. S. ——[7] that "state law is inoperative to prevent the attachment of liens created by federal statutes in favor of the United States" is in conflict with *Erie Railroad* v. *Tompkins*, 304 U. S. 64 and recent decisions of this Court which this Court should reexamine.

This Court has recently decided *Commissioner* v. *Stern*, No. 311 (June 9, 1958) which raises the question of whether there can be a separate substantive federal law of property

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[6] Address Hon. Charles K. Rice, Jr., Asst. Atty-Gen., London (July 25, 1957; 575 CCH Par. 6696.)

[7] (No. 395 and 410 June 9, 1958.)

and thus throws into question the *Waddill*, *Acri*, and *Security Trust* cases, *supra*, etc.

This Court has rendered some few decisions that appear to lay down the doctrine that there is a separate federal, general, or common law by which federal courts alone can reshape all bundles of rights under state law, to fasten United States liens upon them or to divest them from the "res" to which they are attached.

1. *United States* v. *Waddill*, 323 U. S. 353 (1945).
2. *United States* v. *Security Trust & Savings Bank*, 340 U. S. 47 (1950).
3. *United States* v. *Gilbert Associates*, 345 U. S. 361 (1953).
4. *United States* v. *City of New Britain*, 347 U. S. 81 (1954).
5. *United States* v. *Acri*, 348 U. S. 211 (1955).
6. *United States* v. *Scovil*, 348 U. S. 218 (1955).
7. *United States* v. *Colotta*, 350 U. S. 808 (1956).
8. *United States* v. *White Bear Brewing Co.*, 350 U. S. 1010 (1956).
9. *United States* v. *Vorreiter*, 353 U. S. 15 (1957).
10. *United States* v. *R. F. Ball Construction Co.*, 355 U. S. 587 (1958).

The mischief this doctrine has played with settled property rights is very ably set forth in the article by Harold Reeve, Esq., then Chairman of the American Bar Association's Committee on Relative Priority of Government and Private Liens in 29 Rocky Mountain Law Reviews 167 (Feb. 1957). And later reports of that committee authored by its present chairman, Earl Q. Kullman, Esq.

In the *Stern* case, *supra*, this Court applied the doctrine of *Erie* v. *Tompkins*, *supra*, in the case of construction of section 311 of the Internal Revenue Code of 1939, which provides the procedure for pursuing a taxpayers property into the hands of a "transferee". It held that when Congress spoke of a "transferee" it was only speaking of a

"transferee" under state substantive law of property. This Court did not then discuss, as it did in *Erie*, *supra*, Congress' power to create a federal general common law. There is sense and justification to this position which we discuss below.

In the *Bess* case, *supra*, decided at the same time, a federal tax lien was involved, just as here, under the predecessor section to 6321, section 3670. Because there was a lien, this Court, applied a part *Erie*, *supra*, (part state and part federal law) which unlike the *Waddill*, *Acri*, and *Security Trust* cases, *supra*, did not entirely abandon the substantive state law of property in favor of a federal general common law in dealing with the competing interests in the property. As to the property, this Court held:

> "It would be anomalous to view as 'property' subject to lien proceeds never within the insured's reach to enjoy * * *"

and

> "Since § 3670 creates no property rights but merely attaches consequences, federally defined, to rights created under state law * * * we must look first to Mr. Bess' right in the policies as defined by state law."

Having found a right in the taxpayer and defining it by reference to the substantive law of the state this Court then held that that specific interest created by state law that was in the taxpayer was subject to the lien. But this Court drew a division line that sets an impossible goal without saying how it is henceforth to be arrived at.

> "However, once it has been determined that state law creates sufficient interests in the insured to satisfy the requirements of § 3670, state law is inoperative to prevent the attachment of liens created by federal statutes in favor of the United States."

But one of the total interests that was not within the taxpayer's reach to enjoy was the right to lien or charge the property with his debts. It was not part of his security.

But this Court accordingly ruled that the right created by state rule of substantive law which was as much a part of the property owned by the taxpayer as any of the other rights incident thereto which made the property not subject to creditors liens, can and should be disregarded. When it comes to federal tax liens, what this Court did was to disregard a state substantive rule of property which worked a limitation on the full and absolute ownership of the taxpayer to which the lien could attach and not merely strike down a state bar to the attachment of the federal lien. This rule makes the federal lien attach more than the taxpayer owned under state law, and in many cases treads on a staked out interest in the property. The federal government cannot get more than the taxpayer could give.

This rule (*Bess, supra*), is a far better one than the *Waddill, Acri,* and *Security Trust* rule which disregards all state substantive rules of property and sets up a reshaping federal general or common law as to the competing lien to achieve a uniform tax result. But there is no discernible reason why a total general law (*Waddill, supra*) should reshape the competing lien and only a partial general law (*Bess, supra*) reshape the property itself. There is no deserving policy served by either rule. The desire for uniformity of federal taxes cannot be accomplished even under the severe *Waddill, supra*, etc. rule, the rule of *Bess, supra*, is unexplainable, and the rule of *Erie* and of *Stern* is preferable.

The *Erie* and *Stern* doctrine is more desirable and the objective of a federal law is impossible.

First, the *Erie* and *Stern* doctrine tends to more stability and security in state titles. It does not upset long

established and settled rights. See 29 Rocky Mountain Law Review 167. Having two sets of substantive laws, state and federal, characterizing the same property, makes it difficult for one to plot his legal course in relation to rights and liabilities. Situations will develop where one is damned if one does and equally damned if one doesn't. That is, one may have to, in order to make one secure from the claim of a tax lien, lose one's protection as against other liens, and vice versa. Federal general law misdescribes the ownership of interests in a property, as it is, which is the description of state law.

Second, federal decisions formulating what the substantive laws of property shall be or as in *Bess, supra*, whether any of the state rules that bar the federal lien will be disregarded, will be necessarily episodic, and relatively infrequent. This will lead to more confusion and doubt as to what the federal court's position possibly could be. It is neither desirable nor within our jurisprudential policy to foment unrest in titles.

Third, the goal of uniformity to be achieved by a general common law of property is: (1) impossible of achievement; (2) is inapplicable to a lien situation.

(1) The goal of uniformity is impossible of achievement because certainly a minimum amount of state substantive law must be used to determine what interests a taxpayer has and that may vary between the states. Then again, if the competing lien were not to be accorded a full property status under a state law, to achieve uniformity with a federal general law standard this Court consistently would have to accord it an equal property status, such as it might have had in another state. This Court has shown that it is not prepared to do this.

(2) The policy of the law behind uniformity is the goal of achieving equal liability of all taxpayers regardless of

the fortuitousness of location. (Mr. Justice Black's dissent in *Stern, supra*). (a) Actually, this has no relation to the problem of government and private liens. A private lienor has no liability for the federal taxes. He is merely an innocent third party with property rights established and secured by state law in accordance with a state's entire scheme of the interrelation and priority of rights. He purchased or allowed himself into his situation because the states law secured his rights. He is in this respect no different than the "transferee" in the *Stern* case, *supra* (Under § 311).

(b) Uniformity does not prevent shopping for a jurisdiction. Lienors and potential lienors enter into their situation under the states scheme of law in accordance with its framework of risks (priority between it and other creditors). They do shop in this regard and nothing is wrong with them doing so. With a uniform general law, they will still shop, though with far less certainty of their position, and they will shop with relation to the normal attributes of property in the scheme of things under state law also. There is nothing in uniformity that prevents shopping for minimum risks of a poor title.

Then again, some competing lienors, such as lawyers who practice in one state only, are not in any position to shop for a jurisdiction. Location of the property makes shopping impossible in the case of interests in real property and other immovables.

Fourth: There also seems to be an implicit and unspoken two-sided reason that favors a uniform federal general law. There is a fear that in allowing the states a control over the federal government's pursuit of its tax revenues, that the states will favor the individual's or the state's interest over the federal governments or that the states will throw obstructions in the way of the federal government's collections. (the approach of *McCulloch v. Marg-*

land, 4 Wheaton (U. S.) 316). To expose the thought though is to reveal its nakedness. "Not * * * while this Court sits".* * * (Holmes *J.* dissent *Panhandle Oil Co.* v. *Mississippi*) 277 U. S. 218, 223 (1928). This Court can always strike down discriminatory state legislation having as its result the putting of a federal tax lien in a worse position than a similar other lien. But there is no compelling reason to grant its superiority.

The other side of the same reason is a desire to put the federal tax lien on a superior footing because it is the federal government's lien. This is the only justification consistent with a federal general substantive law. Aside from this consistency which is a poor reason, Congress never expressed such reason, never intended it, and this Court should not find it ample justification for all the mischief a federal general law creates.

Fifth: The reasons that this Court sets forth in *Stern*, *supra*, why Congress did not intend to set up a separate federal substantive general common law in relation to Section 311 of the Internal Revenue Law of 1939 applies as well to Section 401 of that law, now 26 U. S. C. 6321 which is applicable here.

Sixth: Property under the Fifth and Fourteenth Amendments to the U. S. Constitution is property created by the substantive law of the states. Let's take an example. If the federal government wished to exercise its right of eminent domain and take a property subject to an attorney's charging lien, could the United States disregard the attorney's property rights under state law and set up different or additional requirements to be considered. We suggest not.

Another parallel is suggested. Would it be proper in order to promote a uniformity of the federal government's power of eminent domain, in order that compensation be

not determined by the fortuitousness of location, to hold invalid the title of and refuse to compensate an owner of a fee simple absolute under the laws of Ohio because under a federal general common substantive law of property, he had no title? Or it was inchoate? See *Swanson* v. *U. S.*, 156 F. 2d 442. Cert. den. 329 U. S. 800.

We suggest that Congress, in writing the tax law, was mindful that in the taking or depriving of property under its power of eminent domain, its enumerated power, its police power, or its tax power, the substantive law of property is state law only.

We now come to the application of all that has been said to the facts of the instant case. The federal government had a right to collect taxes from Pay-O-Matic Corp. None against the Petitioner Pay-O-Matic had property which was taken in condemnation proceedings under state law. The chose in action that Pay-O-Matic Corp. owned was state created. The property interest and lien that Petitioner had was state created. *Erie* and *Stern, supra,* both should require a holding that when the government attempted to impose its lien on a state created property, it took that property in the form it came. Petitioner's and Pay-O-Matic Corps.' interest was governed by state law.

The nature of the taxpayers and the attorney's property was made clear in *Herlihy* v. *Phoenix Assurance Co.*, 274 App. Div. 342, 83 N. Y. Supp. 2d 207, which views a chose in action as incapable of sustaining general liens, (such as tax liens), but the specific lien of an attorney can and does attach from the inception of the action.

This is because of the limited nature of the interest in the chose in action in its possessor.

The state rule is: All choses in action are burdened from their inception with the ultimate costs of reducing said chose to tangible form. The owner of the chose never has full and clear title to it and is incapable of alienating

the full chose, and whoever liens said chose is charged with notice of these costs and takes his lien subject to same, Attorney's liens and disbursements are part of the ultimate costs of reducing the chose to a tangible form and are entitled to priority over all other liens regardless of when they arose. See list of cases pp. 7-8, *supra*.

Thus it has been held that a prior assignment made by the owner of the chose in action is ineffective as against a later attaching attorney's lien. *Lexow* v. *Tremaine*, 232 App. Div. 307, 299, N. Y. Supp. 412, affirmed 277 N. Y. 637, 14 N. E. 2d 207. See the discussion of its meaning in *Herlihy* case, *supra*.

The District Court ably set forth the nature of an attorney's liens under New York State law. It indicated that the attorney's lien is considered choate under state law, it is a property right, and is attached at the commencement of the state condemnation proceeding, August 5, 1955. Under New York State Law the attorney's lien is choate.

This is the state rule in New York that under *Erie* and *Stern*, *supra*, should govern here; but if this Court were to disregard *Erie* and *Stern* and follow *Waddill*, *Acri*, *Security Trust* and *Bess*, *supra*, it surely is the most just rule to follow in setting up a federal property law. Then 26 U. S. C. 6321 should be read as only affixing the federal tax lien on the right to the proceeds part of the chose in action, the other part being necessary for attorney's fees in order to reduce the chose to tangible form. This is what the Third Circuit apparently did in *Filipowicz* v. *Rothensies*, 43 Fed. Supp. 619. But if *Bess*, *supra*, were to be applied, then it is to be noted that New York State law does not envisage a full property of the chose in action in Pay-O-Matic Corp. Only that portion of the chose that is collectible after the fees for attorneys are paid are the taxpayers property. The attorneys portion was never subject to the federal tax lien.

• • •

Petitioner has attempted to show that the *Woodill*, *Acri* and *Security Trust* doctrine, that there is a uniform federal substantive general common law is wrong. We maintain that there is no sound policy reason why it should be the law and that there are strong reasons why it should not be. While this Court shows no signs in past tax lien decisions of having considerd this, this is really not a new argument before this Court, and we cite this Court's language in *Erie* v. *Tompkins*, 304 U. S. 64, when it held as a matter of constitutional limitation as well as Congressional intention, that (p. 78):

> "There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general', be they commercial law or a part of the law of torts. And no clause in the constitution purports to confer such a power upon the federal courts."

This general common law which Congress had no power to declare was said to have included (pp. 75-76):

> "* * * even where the question of liability depended upon the scope of a property right conferred by the State * * * Furthermore state decisions construing local deeds, mineral conveyances, and even devises of real estate were disregarded."

Even the arguments we raise herein are similar (p. 74):

> "Experience in applying the doctrine of Swift v. Tyson, had revealed its defects, political and social; * * * and the impossibility of discovering a satisfactory line of demarcation between the province of general law and that of local law developed a new well of uncertainties."

And we ask this Court in the paraphrase of Mr. Justice Holmes not to hesitate to review and to correct an erroneous assumption of powers by courts of the United States

which no lapse of time or respectable array of opinion should freeze (p. 79):

> "The fallacy underlying the rule declared in *Swift* v. *Tyson* is made clear by Mr. Justice Holmes. (*Kuhn* v. *Fairmont Coal Co.*, 215 U. S. 349, 370-372; *Black & White Taxicab Co.* v. *Brown & Yellow Taxicab Co.*, 276 U. S. 518, 532-36). The doctrine rests upon the assumption that there is a 'transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute,' that federal courts have the power to use their judgment as to what the rules of a common law are; and that in the federal courts 'the parties are entitled to an independent judgment on matters of general law':
>
> 'but law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else * * *' the authority and only authority is the State, and if that be so, the voice adopted by the State as its own (whether it be of its Legislature or of its Supreme Court) should utter the last word.'
>
> Thus the doctrine of *Swift* v. *Tyson* is, as Mr. Justice Holmes said, 'an unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct.' In disapproving that doctrine we do not hold unconstitutional § 34 of the Federal Judiciary Act of 1789 or any other Act of Congress. We merely declare that in applying the doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States."

II.

"CHOATENESS"

Under federal substantive general common law the attorney's lien need not have been, but was "choate".

The Circuit Court, in the instant case, cited *U. S. v. R. F. Ball Construction Company, Inc., et al.*, 355 U. S. 587 (1958), in affirming the District Court's decision herein. In *U. S. v. R. E. Ball Construction Company, Inc.* the defects claimed by the government there bears no relation to the supposed defect that the government and courts below adverted to in the instant case. The government claimed and the lower courts held in the instant case that there was not an "established * * *amount" and to both, this meant that the lien was "imperfected" and "inchoate" and federal general common law requires liens to be "perfected" and "choate" and, of course, Sections 6321, 6322, 6323 employ a separate federal general common law, which Congress intended. Therein lies the issue.

In which way the assignment in *Ball* failed to meet the tests of *U. S. v. New Britain*, 347 U. S. 81, 84, to wit: that the identity of the lienor, the property subject to the lien and the amount thereof be established, we are unaware. Perhaps it was no single factor but the total picture that didn't measure up to the federal general laws measure of a "mortgage". However, none of the defects in *Ball* are similar to the claimed defect in the instant case.

Our position is two-fold. That the contractual lien of the purchaser (and perhaps also of the pledgee and the mortgagee), need not and cannot be perfected in the sense of the *New Britain* criterion, that it have a fixed dollar value, applying to it at all times. It is sufficient that it is describable and ascertained to its extent. It is then "choate".

Secondly, we maintain (in addition to our argument herein, that state law determines the completeness of the property right), that this attorney's lien, as it exists under state law, is a sufficiently perfected property under a federal substantive general law to be allowed to continue to be considered property under a federal substantive law. We shall examine into the nature of the attorney's lien under the laws of New York.

One knowing the dollar value of a given piece of property or indeed having a value adds nothing to its completeness. And half or one-quarter of that is no less certain, nor complete.

The following is immutable fact. Purchasers acquire property. Property does not carry a price tag around on it. Property can be worthless which doesn't detract from its being property. Its value, if indeed it has any, is determined by the market. Market may not be constant, there may be no market; or value in the market may be very low or nil. None of this will destroy the ownership of an item. An illustration: Mr. X owns a plain, ordinary, granite pebble which no one would pay him anything for, as it is an ordinary pebble and worthless. But Mr. X prizes it highly. Whether he is demented or not is beside the point, but he thinks that someday it will have great value.

Question. Is there anything in these facts to suggest any weakness in Mr. X's title?

Does an absence of a value or a value of nothing or a doubt of the value or a questionableness of the exact amount of the value suggest a defect in X's title?

Would the situation be any different if Mr. X owned only a twenty-five per cent interest in the property?

There is one big difference between Petitioner's case and every other case previously decided by this Court. None of the other competing lienors had the title to the

specific property in question transferred to them from the taxpayer-previous-owner. All were in the process of fastening on their title from a right derived by law at the time the government slipped in and filed its lien. In the instant case title was effectively transferred to Petitioner by the retainer agreement. 29 Rocky Mountain Law Review, page 167.

Two: the nature of the attorney's lien as a property under New York State law entitles it to maintain its status as a property under a federal general law.

New York State's Judiciary Law, section 475 (p. 6) in common with similar statutes in other states in the union has enlarged the common law attorney charging lien. Thornton states, 2 Thornton, on Attorneys at Law 976 that:

> "The charging lien, originally, was defined to be the right of an attorney at law to recover compensation for his services from a fund recovered by his aid, and also the right to be protected by the court to the end that such recovery might be effected."

1). There is nothing at variance with the original common law attorney's charging lien that we claim. Our right is based on no additions. 2). Although we have not fully researched the question it is doubtful that there would be many states, if any, that would treat the attorney's lien differently that *Herlihy, supra,* was treated in New York. 3). The New York and general rule works substantial justice to all the interests involved. What greater arguments than these can be raised for the adoption of the New York rule as to attorney's liens as the federal substantive rule.

It should also be noted that the District Court's opinion that the amount of the lien was contingent was not strictly accurate in that the portion of the attorney's lien representing already occasioned disbursements became fixed at $152. (See *Spense* v. *Bode*, 57 Misc. 611, 108 N. Y. Supp. 593.)

III.

"CONSTRUCTION OF PURCHASER"

This Court has never had before it a "purchaser" under 26 United States Code, Section 6323, and a workable and clear definition has never been given by this Court. The term "purchaser" has a well defined and settled meaning in the jurisprudence of our country which should be accorded to it in accordance with the probable legislative intent. "Purchaser" is the term of art for the equitable doctrine of "bona-fide purchaser for a valuable consideration." This ancient rule of the Chancellor's is used frequently in numerous recordings and like statutes in the several states where the interest of third parties are brought into play.

The "valuable consideration" required under the doctrine is any consideration sufficient to support a simple contract as long as it is within the class that the law esteems as an equivalent given for the grant and there is an equivalent given for the grant where the purchaser enters into a binding obligation under the contract from which he cannot withdraw or otherwise innocently change his position and cannot extract himself. Petitioner, Samuel Goldstein is a "purchaser" under its definition and the facts in this case.

The attorney's lien and assignment of award of Petitioner, are entitled to priority under 26 U. S. C. 6323 which provides in part that the secret federal tax lien "shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof shall be filed * * *."

The Notice of Federal Tax Lien here was filed on December 12, 1955, after Petitioner received title as a "purchaser" on or before the date he was retained November 18, 1955 (App. 7A). The retainer agreement provided that the client and delinquent taxpayer, Pay-O-Matic

Corporation "hereby retains * * * and hereby assigns to said attorneys, for their services twenty-five (25%) per cent of any award and interest that may be made for trade fixtures contained in said property." Petitioner is a "purchaser" and being prior in time to the filing of the Tax Lien is prior in right.

By New York State law the retainer agreement has retroactive effect dating back to the commencement of the proceeding, August 5, 1955, *Application of City of New York*, 154 N. Y. S. 2d 104. Under *Erie & Stern, supra*, the attorney's lien attached on August 5, 1955. (Under *Security Trust* this might be disregarded.) This was prior in time to the assessment dates of August 15, 1955 and November 15, 1955.

The assessment date is the date that a delinquent taxpayer's liability becomes fixed in the form of a secret lien on all his properties (except as to purchasers, etc. under 6323). Because its a secret lien, it being legally and factually impossible for any third parties to discover its existence, Congress employed the usual just rule as to saddling third parties with the liabilities of others in 6323. Judge Jackson's concurring opinion in *U. S. Security Trust Company, etc.*, 340 U. S. 47, 52. That is, Congress taking advantage of the experience of the early courts of equity and the state legislatures, took the full blown doctrine developed therein for the protection of third parties and incorporated it in the statute. Under said doctrine, first bona-fide purchasers for value, then mortgagees and pledgees and then judgment creditors were saved harmless from the effect of any previous transfer, lien or other encumbrance if they had no notice, actual or constructive (by recordings, etc.), at the time they took title. This doctrine of bona-fide purchaser was full blown and settled in 1912 when Congress incorporated it into the tax law (26 U. S. C. 6323).

We maintain, consistent with the *Erie & Stern* doctrine, that the question of who is a "purchaser" should be determined under the substantive law of the state, and that Congress legislated with reference thereto. And under the state substantive law as well as any federal substantive law Petitioner is a "purchaser".

See *Ten Eyck v. Witbeck*, 135 N. Y. 40 where the New York State Court of Appeals defined the word "purchaser" in the New York Real Property Recording Act (p. 44):

> "While every legal mode of acquisition of real property, except by descent, is denominated in law a purchase, and the person who thus acquires it a purchaser, it is evident that the word is used in this statute in a much more limited sense. It is there applied only to such grants of real estate as are obtained for money, or some other valuable consideration. It denotes a buyer of property and has reference to one of the actors in a transaction of bargain and sale, which is presumably controlled by commercial considerations."

The Court states that the doctrine is used to differentiate the transactions from gifts, and goes on (p. 48):

> "The phrase a 'purchaser in good faith and for a valuable consideration' is not peculiar to the Recording Act but is one of frequent occurrence in the statutes" and is "an expression which has been borrowed from the language of courts of equity and should be interpreted in the sense in which it is there understood * * *. A valuable consideration has been defined by, writers upon equity jurisprudence as something which the law esteems as an equivalent given for the grant, and it is, therefore, founded on motives of justice."

That Congress intended to incorporate the entire settled doctrine, there can be no doubt and as a rule of construction should be no doubt, and why there may be any doubt is

attributable only to the fact that in *U. S.* v. *Scovil*, 348 U. S. 218 this court, while not dealing with the case of a "purchaser" used the following language:

> "A purchaser within the meaning of Section 3672 (now section 6323) usually means one who acquires title for valuable consideration in the manner of vendor and vendee."

This has been interpreted in some decisions as the beginning of a new federal straight line rule of law (not an equitable doctrine), and frustrated Congress' attempt to apply fair and equitable principles. Thus the 10th Circuit Court in a decision upholding the priority of an attorney's lien *Marteney* v. *United States*, 245 Fed. 2d 135 (1957) held that "in the manner of vendor and vendee" meant "sale", and spelled out the legal doctrine of consideration in the law of contracts rather than the equitable doctrine of bona-fide purchaser's rule of valuable consideration. This court should make it clear that "purchaser" in § 6323 makes reference to the equitable doctrine of bona-fide purchaser for value.

The doctrine of bona-fide purchaser for value grew out of the rule of law that a sealed instrument imported a consideration and a gift was thus possible of enforcement. Equity, however, would not aid the promisee of a voluntary covenant, but left him to his legal remedy, see Williston on Contracts, Rev. Ed., Section 217. Equity's general policy is to protect a third person in trouble. If he is in a position where he gave nothing, or such an insufficient amount as to make his "good faith" suspect or he could legally retrieve himself from his predicament by nonperformance of his obligation, equity would not aid him.

In the last event the test would be whether the bona-fide purchaser had a right of rescission for anticipatory breach of contract or not. *Ten Eyck* v. *Witbeck*, 135 N. Y. 40, 49.

In *La Far* v. *Grimes*, 86 Fed. 2d 809 at 812 the Court said:

> "The principle upon which the doctrine of innocent purchaser for value rests, like equitable principles in general, is not a hard and fast rule of narrow application, but one to be liberally and equitably applied. Under it relief is denied to a purchaser without notice who has not paid value, on the ground that his equity arises not out of his mere lack of notice, but out of injury to him, through an innocent change of position to his prejudice. It is therefore denied where the matter of the payment remains executory between purchaser and seller, and there is no irrevocable change of position. It is granted where either the buyer has paid the purchase price or has entered with third persons into a binding obligation with regard to it, whether the obligation arises out of the execution or the assumption of negotiable promissory notes, or other form of undertaking which the buyer is able to perform, and from which he cannot in law withdraw."

A review of the situation in the instant case reveals the following. Samuel Goldstein, an attorney was retained on November 18, 1955.

From that date on till the completion of his task under the laws of New York, and the laws in most, if not all, states, he could not withdraw, *Carter* v. *Carter*, 188 Misc 156, 66 N. Y. Supp. 2d 768, and filing of the tax lien would not excuse him. He was bound to complete his services. If this court were to change the property rights, as in *Security Trust, etc.* it should change this part of the doctrine too, and excuse the attorney from further performance. This would do justice, but then it might cause a revision of the whole scheme of state law to an unrecognizably form once started. That is why the court should not tamper with state rules to start with. Petitioner hired an expert, who rendered a bill in the sum of $140 which is the fair and

reasonable value of the services rendered. A photographer was engaged who took photographs of the property. He submitted a bill of twelve dollars.

All necessary services in preparation of the case were performed prior to the filing of the government tax lien on December 12, 1955.

Thus petitioner was a "purchaser" on the date of his being retained, November 18, 1955, his having received an assignment of twenty-five percent of the award, in consideration of his promise to represent Pay-O-Matic Corp. in the condemnation proceeding. He was the owner of a quarter interest or a tenancy in common, under state law, at the time the government filed its lien.

In addition to there being "consideration sufficient to support a simple contract," there was a valuable consideration, one within the class that the law esteems as an equivalent given for the grant. The attorney had nearly completely performed his services before the federal government filed its liens. But at any rate, he had no notice when he took; the federal lien being secret. In doing so, he incurred obligations to others for disbursements, and he was, under state law, not excused from continued performance.

CONCLUSION

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

ARTHUR D. GOLDSTEIN,
Attorney for Petitioner-Appellant.

SAMUEL GOLDSTEIN,
M. ROBERT GOLDSTEIN,
ARTHUR D. GOLDSTEIN,
of Counsel.

Appendix A

(Opinion of Circuit Court)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 324—October Term, 1957.

(Argued April 17, 1958 Decided April 28, 1958.)

Docket No. 24920

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

SAMUEL GOLDSTEIN,

Defendant-Appellant.

Before:

CLARK, *Chief Judge* and

LUMBARD and WATERMAN, *Circuit Judges.*

Appeal from the United States District Court for the Southern District of New York, Sylvester J. Ryan, *Judge.*

Samuel Goldstein appeals from a summary judgment for the United States enforcing withholding tax liens against a taxpayer in priority to an attorney's lien for professional services against the same debtor.

ARTHUR D. GOLDSTEIN, of Samuel Goldstein & Sons, New York City, *for defendant-appellant.*

NICHOLAS TSOUCALAS, Asst. U. S. Atty., S. D. N. Y., New York City (Paul W. Williams, U. S. Atty., and John A. Guzzetta, Asst. U. S. Atty., New York City, on the brief), *for plaintiff-appellee.*

PER CURIAM:

Affirmed on the opinion of District Judge Ryan; and see also *United States* v. *R. F. Ball Construction Co.*, 355 U. S. 587.

Appendix B

(Judgment)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 28th day of April, one thousand nine hundred and fifty-eight.

Present:

HON. CHARLES E. CLARK,
Chief Judge,

HON. J. EDWARD LUMBARD,
HON. STERRY R. WATERMAN,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

SAMUEL GOLDSTEIN,
Defendant-Appellant,

PAY-O-MATIC CORPORATION, THE CITY OF NEW YORK, and R. L. POLK & COMPANY, INC.,
Defendants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.

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JAMES R. BROWNING, Clerk

No. 215

In the Supreme Court of the United States

OCTOBER TERM, 1958

SAMUEL GOLDSTEIN, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

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CHARLES K. RICE,
Assistant Attorney General,

A. F. PRESCOTT,
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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 215

SAMUEL GOLDSTEIN, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the District Court (R. 48) is not officially reported. The *per curiam* opinion of the Court of Appeals (Pet. 30-31) is not yet officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 28, 1958. (Pet. 32.) The petition for a writ of certiorari was filed on July 24, 1958. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether a federal tax lien attaching to a cause of action and to the proceeds thereof belonging to a delinquent taxpayer is prior to an attorney's lien attaching later to the same property, where the attorney's lien is contingent as to amount and not reduced to judgment at the time the federal lien attached and was filed.

2. Whether an attorney under a retainer agreement with a delinquent taxpayer, whereby the taxpayer agreed to pay and assign to the attorney as compensation for future services a percentage of the award that might result upon the outcome of an action to which a federal tax lien attached, is a "purchaser" within the meaning of Section 6323(a) of the 1954 Code.

STATUTES INVOLVED

Internal Revenue Code of 1954:

SEC. 6321. LIEN FOR TAXES.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

[26 U.S.C. 1952 ed., Supp. V, Sec. 6321.]

SEC. 6322. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the

time the assessment is made and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time.

[26 U.S.C. 1952 ed., Supp. V, Sec. 6322.]

SEC. 6323. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.

(a) *Invalidity of Lien Without Notice.*—Except as otherwise provided in subsection (c), the lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate—

(1) *Under state or territorial laws.*—In the office designated by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law designated an office within the State or Territory for the filing of such notice; * * *

* * * *

[26 U.S.C. 1952 ed., Supp. V, Sec. 6323(a).]

New York Judiciary Law (29 McKinney's Consolidated Laws of New York Annotated):

SEC. 475. *Attorney's lien in action, special or other proceeding*

From the commencement of an action, special or other proceeding in any court or before any state, municipal or federal department, except a department of labor, or the service of an answer containing counterclaim, the attorney who ap-

pears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report, determination, decision, judgment or final order in his client's favor, and the proceeds thereof in whatever hands they may come; and the lien cannot be affected by any settlement between the parties before or after judgment, final order or determination. The court upon the petition of the client or attorney may determine and enforce the lien.

STATEMENT

Pay-O-Matic Corporation is a delinquent taxpayer owing the United States withholding taxes for the years 1954 and 1955. (R. 48.) The taxes were assessed against the taxpayer on August 15, 1955, and November 15, 1955, in the respective amounts of $6,497.42 and $4,388.83. (R. 6.) The total amount outstanding on these assessments is $6,213.19 (R. 6), and the amount of the fund in question in this case is $4,569.28 (R. 48).

On August 5, 1955, the City of New York became vested with title to certain trade fixtures of the taxpayer as part of a condemnation proceeding. (R. 48.) Subsequently, on November 18, 1955, the petitioner was retained by the taxpayer to represent it in the condemnation suit. The written retainer provided (R. 56):

> PAY-O-MATIC CORPORATION hereby retains SAMUEL GOLDSTEIN & SONS as its attorneys to represent it in the * * * proceeding, and agrees to pay and hereby assigns to said attorneys, for their services twenty-five (25%) per cent of any award * * * that may be made * * *.

Said attorneys' compensation is to be paid when the award is paid by the City.

A notice of lien for professional services was filed by the petitioner on November 22, 1955. (R. 48.)

On December 12, 1955, a notice of federal tax lien for $11,629.44 was properly filed in the office of the Register of New York County. On April 5, 1956, a notice of levy was filed with the Comptroller of the City of New York for $5,262.64 due from the taxpayer for withholding taxes for all of the year 1955, to attach to any funds due taxpayer for the property taken by the city. On June 27, 1956, an amended notice of federal tax lien was filed for $11,882.43 in the Register's office and with the Comptroller. (R. 48.)

A final decree was entered on August 22, 1956, in the Supreme Court of the State of New York, County of New York, in the condemnation proceeding awarding the taxpayer a total of $4,569.28 as compensation for the property taken by the city. (R. 48.)

Subsequently, on April 30, 1957, the petitioner moved the Supreme Court of the State of New York for an order determining, fixing, and enforcing his attorney's lien in the sum of $1,294.32. (R. 25, 37, 55.)

On June 6, 1957, this action was commenced by the United States pursuant to 28 U.S.C., Section 1345, to enforce collection of its tax lien in the total unpaid amount of $9,669.03, together with interest and penalties. (R. 5, 6.) Pursuant to motion by the United States, the District Court enjoined the City of New York from paying out any part of the award until determination of this action, and it also enjoined all

parties from proceeding further against the award. (R. 31-32.) Only the petitioner appeared in the present action (R. 48), and both the United States and the petitioner moved for summary judgment. The District Court granted the Government's motion, denied the petitioner's motion, and entered judgment for the United States. That court held that the United States, by virtue of its tax liens, had rights prior to those of the petitioner. (R. 48.) The Court of Appeals, *per curiam*, affirmed the judgment of the District Court. (Pet. 30-31.)

ARGUMENT

The decision of the court below is in accord with numerous decisions of this Court. There is no conflict or other reason for further review.

1. Involved here is the question of relative priorities as between the lien of the United States for unpaid withholding taxes and an attorney's lien which exists by virtue of Section 475 of the New York Judiciary Law, *supra*, pp. 3-4.

Section 6321 of the Internal Revenue Code of 1954, *supra*, p. 2, imposes a lien "in favor of the United States upon all property and rights to property, whether real or personal," belonging to the delinquent taxpayer. Except as to the lien of a mortgagee, pledgee, purchaser, or judgment creditor,[1] a tax, when assessed, constitutes a fully perfected lien in favor of the United States as against all other subsequent liens.

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[1] As to those specific categories, the federal tax lien must be filed in order to constitute a valid lien. Section 6323(a), Internal Revenue Code of 1954, *supra*, p. 3.

or prior inchoate liens, whether filed or unfiled. *United States* v. *Vorreiter*, 355 U. S. 15; *United States* v. *White Bear Brewing Co.*, 350 U. S. 1010, *United States* v. *Colotta*, 350 U. S. 808; *United States* v. *Scovil*, 348 U. S. 218; *United States* v. *Acri*, 348 U. S. 211; *United States* v. *New Britain*, 347 U. S. 81; *United States* v. *Gilbert Associates*, 345 U. S. 361; *United States* v. *Security Tr. & Sav. Bk.*, 340 U. S. 47; Sections 6321 and 6322, Internal Revenue Code of 1954, *supra*, pp. 2-3.

Accordingly, in this case the federal tax lien attached, fully perfected on August 15, 1955,[2] to the cause of action belonging to the delinquent taxpayer which arose by virtue of the condemnation of its property by the City of New York, and also subsequently attached to the award given the taxpayer by virtue of the condemnation proceedings. (R. 4, 10, 37, 48.) Under local law, the petitioner's attorney's lien attached to the same property. Section 475, New York Judiciary Law. The petitioner, citing state cases (Pet. 7-8, 16-17, 22) which apply local law, claims that his lien should be accorded priority over the lien of the United States.

It is well-settled that the relative priority of the

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[2] This lien arose by virtue of the assessment of August 15, 1955. (R. 6.) Subsequently, the amount of the lien was enlarged by virtue of assessments for additional tax on November 15, 1955. (R. 6, 48.) In point of time, the petitioner's lien attached subsequent to the federal tax lien—the contract of retainer not being executed until November 18, 1955 (R. 56)— and, as the petitioner recognizes (Pet. 21), the doctrine of relation-back does not apply here. *United States* v. *Security Tr. & Sav. Bk.*, *supra*, p. 50.

lien of the United States for unpaid taxes is a federal question, and that the state's characterization of its liens, while good for all local purposes, is not controlling.[3] *United States* v. *Acri*, *supra*, p. 213; *United States* v. *Security Tr. & Sav. Bk.*, *supra*, pp. 49-50; *United States* v. *Bess*, 357 U. S. 51, 56-57; *United States* v. *Waddill Co.*, 323 U. S. 353, 356-357. A local lien which is contingent upon the taking of further steps for enforcement is, for federal tax purposes, unperfected or inchoate, and therefore subordinate to the federal tax lien.[4] *Illinois* v. *Campbell*, 329 U. S. 362, 375; *United States* v. *Security Tr. & Sav. Bk.*, *supra*, p. 51; *United States* v. *Scovil*, *supra*, p. 220; *United States* v. *Acri*, *supra*, p. 214; *United States* v. *New Britain*, *supra*, p. 84.

These principles clearly accord priority to the Government's lien here. Under the law of the state, the attorney's lien, which arises as a result of his services in an action, attaches to the cause of action and to any award given his client as a result of the action. The lien under state law relates back to the time the cause of action was commenced. Section 475, New

[3] The petitioner's suggestion (Pet. 15-16, 18-19) that the statute is unconstitutional is without merit. The constitutionality of the statute and its rule was settled by *Michigan* v. *United States*, 317 U. S. 338, 340. The petitioner's reliance (Pet. 9-15) upon *Commissioner* v. *Stern*, 357 U.S. 39, is also without merit. See *United States* v. *Bess*, *supra*, pp. 54, 57.

[4] An attorney's lien is subject to the same principles applicable to any other state created liens in determining the relative priority of the lien of the United States for unpaid taxes. *First State Bank of Medford* v. *United States* (Minn.), decided July 11, 1958 (58-2 U.S.T.C., par. 9758), citing *United States* v. *Ball Construction Co.*, 355 U.S. 587.

York Judiciary Law. This lien, however, is wholly contingent upon, among other things, the attorney's or his client's petitioning the court to determine and enforce it. Section 475, New York Judiciary Law. The petitioner here did not reduce his lien to judgment. Moreover, he did not seek to take the steps necessary to determine, fix, and enforce his lien until subsequent to the time when a final decree was entered in the condemnation proceeding. At that time the federal tax lien had already attached and was properly filed. (R. 25, 37, 48.) Therefore, the petitioner's lien, which could not have become perfected until subsequent to the date the federal lien had attached and notice thereof filed, cannot displace the federal lien. *United States* v. *Liverpool & London Ins. Co.*, 348 U. S. 215, 217; *United States* v. *Security Tr. & Sav. Bk.*, *supra*, p. 50.

2. The petitioner's contention (Pet. 23-28) that at the time of the execution of a retainer agreement between himself, as attorney, and the delinquent taxpayer, as client, he became a "purchaser" within the meaning of Section 6323(a) of the Internal Revenue Code of 1954, *supra*, p. 3, is also without merit. Section 6323(a) in effect accords priority to the lien of a mortgagee, pledgee, purchaser, or judgment creditor over federal tax liens which are unfiled at the time the former liens became such. In this case, the federal liens arose on August 15, 1955, and Novem-

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[1] See for example, *Matter of Cooper (McCauley)*, 291 N.Y. 255; *Matter of Anderson* v. *U. S. Fidelity & Guaranty Co.*, 238 App. Div. 48; *Matter of Beckett*, 112 Misc. 45.

ber 15, 1955. (R. 6.) Subsequently, the retainer was executed on November 18, 1955, and the federal tax lien was filed on December 12, 1955 (R. 48). The petitioner argues (Pet. 23) that "The Notice of Federal Tax Lien here was filed * * * after Petitioner received title as a 'purchaser' on * * * the date he was retained November 18, 1955", and therefore his interests are prior to those of the United States.

Where, as here, a federal lien has attached to property belonging to a taxpayer, federal law[11] determines the character of any claim of right or interest in such property which is adverse to the federal lien. *United States* v. *Bess*, 357 U. S. 51; *Poe* v. *Seaborn*, 282 U. S. 101; *Fidelity & Deposit Co.* v. *New York City Housing Auth.*, 241 F. 2d 142 (C.A. 2d); *United States* v. *Hoper*, 242 F. 2d 468 (C.A. 7th); *United States* v. *Hawkins*, 228 F. 2d 517 (C.A. 9th). Under federal law, a "purchaser" is one who acquires title for a valuable present consideration in the manner of vendor and vendee. *United States* v. *Scovil*, *supra*, pp. 220-221; *Marteney* v. *United States*, 245 F. 2d 135, 138 (C. A. 10th); *United States* v. *Hoper*, *supra*, pp. 470-471; *United States* v. *Hawkins*, 228 F. 2d 517, 519 (C. A. 9th). An attorney under a retainer agreement for future services is not, in the normal sense of the term, a vendee. Indeed, the retainer contract here explicitly provides that it is an agreement providing "compensation" for services (R.

[11] It should be noted here that even under state law the petitioner was not a purchaser. See fns. 7 and 8, *infra*, pp. 11-12.

56); it is in all respects a contract for services and not one of purchase and sale in the ordinary sense.[7]

Moreover, if a service contract could be likened to a sale—which it is not, even under the applicable local law (see fn. 7)—the retainer agreement here provided that the delinquent taxpayer would pay for services of the petitioner to be performed in the future, and that the compensation was to be paid from a fund not in existence; in no event was the petitioner to receive compensation until the future fund or award was paid by the city. (R. 56; see R. 36, 40, 48, 53.)[8] Hence, at the time the federal tax lien was filed in December, 1955 (R. 48), and fully protected as against purchasers, the retainer was inchoate

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[7] The New York cases—adopting a somewhat similar approach in that they recognize the essential character of a transaction as determinative of the question as to whether a contract is one of sale—hold that a service contract is not a sale. *Carlson, Holmes & Bromstad, Inc.* v. *Stewart & Co., Inc.*, 117 Misc. 607, 608, affirmed without opinion, 246 App. Div. 522; *Haag* v. *Klee*, 162 Misc. 250; *Racklin-Fagin Construction Corp.* v. *Villar*, 156 Misc. 220; *City Title Ins. Co.* v. *Traub*, 116 N.Y.S. 2d 35.

[8] Indeed, under local law no sale occurred upon the execution of the contract, and certainly there was no present transfer of title to property. Section 86(3), New York Personal Property Law (40 McKinney's Consolidated Laws of New York Annotated). See, for example, *Bulldog Electric Prod. Co.* v. *Cole Electric Prod. Co.*, 134 F. 2d 545, 547 (C.A. 2d). Further, under New York law the taxpayer could cancel the retainer at any time without being subject to a suit for breach of contract. *Matter of Weitling*, 266 N. Y. 181; *Levine* v. *Levine*, 206 Misc. 884. Obviously, the taxpayer did not transfer title to anything to the petitioner under the retainer agreement.

and unperfected—not falling within the protection of Section 6323(a) of the 1954 Code. *United States* v. *Ball Construction Co., supra.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER, 1958.

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IN THE

Supreme Court of the United States

October Term, 1958

No. 215

UNITED STATES OF AMERICA,

Respondent-Appellee,

—v.—

SAMUEL GOLDSTEIN,

Petitioner-Appellant.

PETITIONER'S REPLY BRIEF

ARTHUR D. GOLDSTEIN,
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217 Broadway,
New York, N. Y.

IN THE

Supreme Court of the United States

October Term, 1958

No. 215

UNITED STATES OF AMERICA,
Respondent-Appellee,

—v.—

SAMUEL GOLDSTEIN,
Petitioner-Appellant.

PETITIONER'S REPLY BRIEF

Preliminary Statement

Sixty days have elapsed since the filing of the petition for certiorari herein. The Respondent requested and secured a thirty day extension for filing its Brief herein. In the intervening time, the cases which have been added to this Court's docket underline the importance of the issues presented in this and the other cases to be hereinafter mentioned and the desirability of granting certiorari in all of them so that there can be an orderly resolution of the issues presented and the principles which the cases present.

I.

Cases Now Pending on This Court's Docket.

American National Bank of Jacksonville v. United States, No. 261. Certiorari to the Fifth Circuit, case below, 255 F. 2d 504. The Court is afforded an opportunity of resolving the same issue which was presented in *United*

States v. R. F. Ball Construction Co., 355 U. S. 587. The Respondent thought the issue in *Ball* was so simple that it requested granting of certiorari and reversal without the filing of Briefs or argument. While the Court decided *Ball, per curiam*, there were four dissents. In No. 261, the Petitioner specifically raises the issue of *Erie R. Co. v. Tompkins*, 304 U. S. 64, and the result may now be very different than the scope of the issues which this Court, under its rules, was permitted to investigate and determine under the *Ball* petition. In addition, No. 261 shows a case where the Respondent has lost on its contentions that a Federal Tax Lien against a husband attaches to real property held by the husband and wife as tenants by the entirety. It is most significant that the Respondent did not choose to file a cross-petition in No. 261 but advanced the remarkable contention in its Brief in Opposition that certiorari should be denied in that case since its contentions with respect to the tenancy by the entirety should have been sustained by the Fifth Circuit. The instant case captioned above likewise raises the applicability of *Erie R. Co. v. Tompkins*.

Aquilino v. United States, No. 132, and *United States v. Hulley*, No. 300, both present questions of the applicability of State or Federal law in determining the property right which is subject to a Federal Tax Lien. No. 132 is from the Court of Appeals of the State of New York (3 N. Y. 2d 511), and the most significant point to be mentioned with respect to the Respondent's Brief in that case is that he contends that the determination was made pursuant to State law whereas the Respondent's argument to the Court of Appeals was that only Federal law controlled. (See Official Reporter's summary, 3 N. Y. 2d at 54-513.) That the New York Court of Appeals would probably now reach a different result in *Aquilino*, No. 132, because of this Court's decisions in *Commissioner v. Stern*, 357 U. S. 39 and *United States v. Bess*, 357 U. S. 51, see *United States v. Aetna Casualty & Surety Co.*, 4 N. Y. 2d 639; it

is most significant that the Respondent herein has not chosen to seek review of *Aetna*. The decision in that case is cited to this Court in both the *Aquilino* petition and also in the petition in *American National Bank of Jacksonville*, No. 261.

Directly contrary to *Aquilino* is *United States* v. *Hulley*, No. 300, certiorari to the Florida Supreme Court, 102 So. 2d 599. There the Florida Court applies State law. This Court's attention is invited to the inconsistency of the argument of the Respondent herein in its Brief in Opposition in No. 132 as contrasted with its petition for certiorari in No. 300.

DuBois, Trustee of Cherry Valley Homes, Inc. v. *United States*, No. 304, certiorari to the Third Circuit 255 F. 2d 706. Whether the claim of a creditor against a bankrupt, which was only a general claim under the bankruptcy law, was promoted to priority status because the bankrupt's creditor happened to be a delinquent Federal taxpayer, and the claim against the bankrupt was levied upon for the creditor's taxes. It is, of course, well known that Revised Statutes, § 3466, directly construed by the Third Circuit in the *Cherry Valley Homes* case is a thread common to all Federal Tax Lien cases since the provisions of R. S. § 3466 have been frequently relied upon by this Court in the determination of tax liens in non-bankruptcy cases. (See the 1956 *Report of the Committee on Relative Priority of Government and Private Liens*, Real Property Section, American Bar Association, at pages 128-129 of the 1956 Proceedings of that Section.)

Sims v. *United States*, No. 88, certiorari to the Fourth Circuit, — F. 2d — (as yet unreported, 1958-2 CCH USTC paragraph 9269). Whether the West Virginia State Auditor can be held personally liable for a penalty in excess of the penalty provided by State law for failing to honor a Federal tax levy against a State employee's wages where the employee was a tax delinquent. While not citing

Erie R. Co. v. *Tompkins*, *supra*, we submit that the case fairly presents an issue as to whether State or Federal law governs the extent of the liability of a debtor where the property right has been garnished for application to an unpaid Federal tax of the creditor.

We submit that all of the foregoing cases involve principles common to the instant case and to each other. That the orderly administration of justice requires the grant of certiorari in all of them so that the issues can be considered and decided together.

II.

Significant Cases Which the Respondent Has Not Chosen to Appeal.

Just as this Court substantially rejected all of the government's contentions in *Commissioner* v. *Stern* and *United States* v. *Bess*, *supra*, the government has suffered other very significant defeats in the State Courts and in the Circuit Courts of Appeal. By failing to appeal to this Court for the ultimate resolution of the issues involved, the government has enlarged a growing area of uncertainly of applicable principles in the field of Federal liens.

United States v. *Aetna Casualty & Surety Co.*, 4 N. Y. 2d 639, was previously mentioned in connection with *Aquilino*, No. 132, *supra*. The New York Court of Appeals holds that State law controls in the determination of the property right which can be subjected to a Federal lien, in that case as in the instant case, a Federal Tax Lien.

Directly contrary to the instant case herein and specifically involving an attorney's lien is *Matter of City of New York (Washington Square Slum Clearance)* [*United States* v. *Coblentz*], 4 A.D. 2d 869 (10) leave to appeal to the Court of Appeals granted, 4 A. D. 2d 947 (23).

United States v. Durham Lumber Co., Fourth Circuit. F. 2d (unreported, see CCH 58-2 USTC paragraph 9736). The Fourth Circuit takes an identical state of facts as is presented to this Court in *Aquilino*, No. 132, disagrees with the reasoning of the New York Court of Appeals, and holds that State law governs under this Court's decisions in *Sterne* and *Boss*, *supra*. The *Durham* case is referred to but without citation or analysis in the Reply Brief filed in this Court in *American National Bank of Jacksonville*, No. 261.

CONCLUSION

We submit that the foregoing shows that the issues presented in the instant case and in the other cases now pending on this Court's docket presents substantial issues which should be authoritatively settled by this Court. We submit that certiorari should be granted herein.

Respectfully submitted.

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SUPREME COURT U S

IN THE

Supreme Court of the United States

October Term, 1958

No. 215

UNITED STATES OF AMERICA,

Respondent,

against

SAMUEL GOLDSTEIN,

Petitioner.

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING OUT OF TIME

AND

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR CERTIORARI

Motion

Petitioner respectfully moves for leave to file, out of time, the annexed petition for rehearing of the order of this Court (358 U. S. 830) entered October 13, 1958. This motion and the annexed petition are based on the following grounds:

1. Subsequent to the denial of the petition for certiorari herein, the Court of Appeals of the State of New York in an almost exactly identical case arising at the same time, in the same Court, out of attorneys' services rendered in the same proceedings; reached an exactly opposite conclusion than the United States Court of Appeals for the Second Circuit did in the instant case. *In the matter of acquiring title, Re: Washington Square Slum Clearance, Borough of Manhattan, City of New York; Coblentz* v.

United States, et al., — N. Y. 2d — (March 5, 1959) while the majority was able to find matters to distinguish that case from this, the minority opinion correctly stated that:

> "The Pay-O-Matic case, also involving priority between an attorney's lien on a condemnation award and a federal tax lien, is indistinguishable from the case before us."

The conflict of other decisions with the Circuit Court's decision herein, discussed in the petition for certiorari herein, is now amplified with this starkly direct and irreconcilable decision by the New York State Court of Appeals. Both the *Coblentz* case, *supra*, and the instant case presents the identical question. We submit that the careful study made by the New York Court and the considerable length, as well as the soundness of its opinion, is further evidence of the importance of this basic question, and hence constitutes supervening action of substantial and controlling effect, which warrants this Court in reconsidering the denial of certiorari in the interests of substantial justice and uniformity of the law.

2. Further, after the denial of certiorari herein, and on February 25th this Court granted certiorari in No. 432—*Aquilino* v. *United States* and No. 579—*United States* v. *Durham Lumber Co.* Both cases present the same general question as that presented in the instant case: That is, whether federal or state law is to be applied in determining the nature of the interest one has in any property where the Federal Government asserts a lien. We submit that if a proper determination is to be had of the general question, certiorari should be granted in this case.

3. This Court has recently handed down two decisions, *Rogers* v. *Calumet National Bank of Hammond* (No. 468) and *Hermann* v. *Rogers* (No. 572) in which it summarily overruled like contentions of the Government therein and is in irreconcilable conflict with the Circuit Court's decision herein.

Jurisdiction

The jurisdiction of this Court to entertain the petition for certiorari was not denied by the respondent's brief in opposition thereto. It is the consistent practice of this Court to reconsider denials of certiorari in the light of subsequently arising conflict and grant certiorari. *Stone* v. *White*, 300 U. S. 643; *Clark* v. *Manufacturers Trust Co.*, 337 U. S. 953, 338 U. S. 241, 242; *Zap* v. *United States*, 330 U. S. 800; *Land* v. *Dollar*, 341 U. S. 737; *United States* v. *Ohio Power Co.*, 353 U. S. 98; *Goldbaum* v. *United States*, 347 U. S. 1007; *Banks* v. *United States*, 347 U. S. 1007; *McFee* v. *United States*, 347 U. S. 1007; *Friedberg* v. *United States*, 347 U. S. 1006.

Prayer for Relief

Wherefore, petitioner prays that this motion be granted, that the annexed petition for rehearing be granted and that on such rehearing that the order denying the petition for certiorari be vacated and such petition be granted and the judgment appealed from be reversed, and for such other and further relief as this Court may deem just and proper.

Dated: New York, N. Y.,
March 31, 1959.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1958

No. 215

UNITED STATES OF AMERICA,

Respondent,

against

SAMUEL GOLDSTEIN,

Petitioner.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR CERTIORARI

Petitioner prays that this Court grant a rehearing of its order of October 13, 1958 (358 U. S. 830) denying certiorari herein and pray that the writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit in the above entitled cause as prayed for in the petition filed July 24, 1958.

Reasons for Granting Rehearing and Issuing the Writ

1. At the time this Court's order was entered, as set forth in the preceding paragraph, the conflict in the decisions of the various Courts was not as apparent as it is now. The recent decision in *In the matter of acquiring title, re: Washington Square Slum Clearance, Borough of Manhattan, City of New York, Coblentz v. United States*, — N. Y. 2d — (March 5, 1959) is in direct and irreconcilable conflict with the decision herein of the Court of Appeals for the Second Circuit.

2. Essentially the main question raised here was answered negatively in the Court below and is now answered affirmatively in the *Coblentz* case, *supra*. The question raised is if state law (or federal law) controls in determining the interests owned in a state created cause of action when the United States has a tax lien on that cause of action. Secondly asked, is whether it is state (or federal) law that controls in determining the property status of each interested party in relation to the cause of action.

3. The same general question raised in the instant case is being presented in two cases where this Court has granted certiorari—*United States* v. *Aquilino* No. 132 and *United States* v. *Durham Lumber Co.* No. 579. They too question whether it is state (or federal) law that controls in determining the interests in property where the Federal Government claims a lien against a property. More specifically, that case asks whether state (or federal) law determines the interests of a mechanic or materialman in property constructed by them for a delinquent taxpayer when the Federal Government asserts a tax lien.

4. The stark conflict between the decision in this case and the *Coblentz* case, *supra*, is borne up when the Court considers that both that case and this case arose in and before the same Court, the Supreme Court of the State of New York, New York County, Special Term Part VIII on motions to fix attorneys' fees made at approximately the same time; that the attorneys' fees were earned in the same condemnation proceeding; that the material provisions in issue in the written retainer agreements are the same. That case was directly appealed up through the New York Courts. The instant case was enjoined when in the State Court by a Federal Court, and reinstituted as this action in the Federal Court.

The government pressed the similarity between the two cases in the New York Court of Appeals. (Gov't's Brief, p. 15) as authority for reversing the lower Courts therein.

It stated that the facts in the two cases are almost identical. Instead, the Court of Appeals attempted to distinguish the two cases instead of admitting that the Circuit Court's decision herein is wrong. We suggest that the minority opinion is correct insofar as it comments that:

> "The Pay-O-Matic case, also involving priority between an attorneys' lien on a condemnation award and a federal tax lien, is indistinguishable from the case before us."

5. We submit that this Court can consider this case along with the *Aquilino* and *Durham Lumber Cases*, Nos. 130 and 579 without taxing the Court's time and energy too much more than if certiorari had not been granted. Additionally, granting certiorari will somewhat broaden the scope of the review of the very important question already before it. And it would be fairer to keep this case alive, and apply to petitioner the benefit of a favorable determination, if such is made in the other cases. Justice would not be served otherwise, if petitioner could do nothing despite a favorable determination by this Court.

Favorable action by this Court is anticipated by virtue of the recent decisions in *Rogers* v. *Calumet National Bank of Hammond* (No. 468) and in *Herimann* v. *Rogers* (No. 572). There this Court unanimously applied state property law summarily overruling the contentions of the Government in a manner which is in irreconcilable conflict with the Circuit Court's decision herein. It would be unfortunate for the Circuit Court's decision in the instant case to stand, for procedural, rather than substantive reasons.

6. For the reasons given above, reconsideration is also called for in *American National Bank of Jacksonville* (No. 261) and in *Hully* (No. 300). We are informed that application, therefore, will soon be made in the former. A decision in *Aquilino* (No. 130) and *Durham Lumber Co.* (No. 579) can be determinative of these two.

We submit that this is the type of irreconcilable and embarrassing conflict, which warrants the intervention of the Court herein. It is further submitted that we have shown substantial grounds for reconsideration by this Court of the prior action on denying review herein. We have shown that since the filing of the petition herein there have been developments of supervening importance indicating a substantial change of position of this Court which warrants reconsideration of this case in the interest of substantial justice and uniformity of the decisions and determinations of this Court.

Conclusion

The petition for rehearing should be granted, the denial of certiorari vacated and the petition for certiorari granted.

Respectfully submitted,

ARTHUR D. GOLDSTEIN,
Counsel for Petitioner,
217 Broadway,
New York 7, New York.

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58 of the Rules of this Court.

ARTHUR D. GOLDSTEIN,
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217 Broadway,
New York 7, New York.

Certificate of Service

I hereby certify that the foregoing petition and motion were served upon the Solicitor General by depositing copies thereof in a first class postpaid wrapper addressed to him at his office.

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